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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

STELWAGON MANUFACTURING COMPANY

Petitioner,

v.

TARMAC ROOFING SYSTEMS, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 4 of the Clayton Act require a plaintiff which successfully proves unlawful price discrimination and a decline in sales and profits to produce "direct evidence of injury"?

2. Does Federal Rule of Evidence 803(3) permit evidence of customers' out of court statements to be admitted as proof of motive relevant to both competitive injury and antitrust damage in a price discrimination case?

PARTIES TO THE PROCEEDING

Petitioner, Stelwagon Manufacturing Company, has no parent or subsidiaries.

Respondent, Tarmac Roofing Systems, Inc., has no subsidiaries, but has a parent company, Tarmac, plc, a United Kingdom company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Stelwagon Manufacturing Company ("Stelwagon"), respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit ("Third Circuit") in this case. The Third Circuit's Judgment and Opinion dated August 24, 1995, deny Stelwagon a remedy for proven unlawful price discrimination because Stelwagon failed to prove antitrust injury with "direct evidence." This new requirement is directly contrary to this

Court's established precedent, most recently expressed in Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), and squarely presents an issue of broad national importance under Section 4 of the Clayton Act.

OPINIONS BELOW

The Third Circuit's Opinion dated August 24, 1995 ("Opinion"), is reported at 63 F.3d 1267, and is reproduced in the Appendix beginning at App. 1a. The Opinion affirmed in part and reversed in part an opinion and order of the United States District Court for the Eastern District of Pennsylvania dated September 12, 1994, which is reported at 862 F.Supp. 1361 and reproduced in the Appendix beginning at App. 24a.

STATEMENT OF JURISDICTION

The Third Circuit entered its Judgment on August 24, 1995. App. 22a-23a. On September 7, 1995, Stelwagon filed a timely petition for panel rehearing or rehearing en banc. The Third Circuit denied that petition by Order dated September 27, 1995. App. 47a-48a. Circuit Judges Becker, Stapleton and Mansmann voted for rehearing. Id.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS AND FEDERAL RULE OF EVIDENCE.

1. Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15(a)(West 1995 Supp.), states in relevant part:

"[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. Section 1 of the Robinson-Patman Act, 15 U.S.C. § 13(a)(West 1973), states in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent

> competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them...."

3. Federal Rule of Evidence 803(3) states that the following "is not excluded by the hearsay rule, even thought the declarant is available as a witness":

> "A statement of the declarant's then existing state of mind, emotion, sensation, a physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

STATEMENT OF THE CASE

Stelwagon is a wholesale distributor of roofing and related products to hundreds of small to medium-sized roofing contractors in the Philadelphia area. Among the many products Stelwagon sells are modified asphalt products ("MAPs"), which are rolled coatings normally applied to flat roofs.

In 1988, Respondent, Tarmac Roofing Systems, Inc. ("Tarmac"), a new MAPs manufacturer, solicited Stelwagon to be a Tarmac distributor. Tarmac intended to use Stelwagon to create a market for its MAPs in the Philadelphia market of small and medium-sized roofing contractors. Based on

Tarmac's promise of a semi-exclusive distributorship and fair pricing, the companies entered into a distribution agreement.

Stelwagon built demand for Tarmac MAPs in the Philadelphia market, to the exclusion of demand for other MAPs manufacturers' products. In February 1989, Tarmac acknowledged Stelwagon's "excellent support" as a distributor.

But, beginning in March, 1989, some Stelwagon customers stopped buying Tarmac MAPs from Stelwagon because several of Stelwagon's competitors were selling those same products at substantially lower prices. In many instances, Stelwagon's customers enjoyed retail prices for Tarmac MAPs from competing distributors which were at or about the wholesale price Stelwagon paid to Tarmac. Tarmac acknowledged Stelwagon's complaints about its inability to compete, but falsely denied charging lower prices to other distributors. Tarmac also began selling its MAPs within Stelwagon's exclusive market area in violation of the distribution agreement.

From 1988 through 1990, certain of Stelwagon's competitors enjoyed a price advantage ranging from 5% to 25% below the prices Stelwagon paid for Tarmac MAPs. Stelwagon successfully had promoted Tarmac MAPs to virtually all of its MAPs customers as a cheaper and favorable alternative to other brands, causing many of those customers to change loyalties to Tarmac. Accordingly, as Tarmac discounted prices to Stelwagon's competitors, Stelwagon's customers went to those favored distributors to buy Tarmac MAPS. Stelwagon's sales of

Tarmac MAPs declined, as did its aggregate sales of all brands of MAPs. Compared to its business in other roofing and related products during the relevant period, Stelwagon's MAPs business stagnated.

Stelwagon instituted this action in February, 1992, seeking damages for price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. §§ 13 et seq., and breach of the distributorship agreement. The District Court exercised subject matter jurisdiction pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, as well as under 28 U.S.C. §§ 1331 and 1337, and supplemental jurisdiction over Stelwagon's breach of contract claims pursuant to 28 U.S.C. § 1367.

During a six day trial in December, 1993, Tarmac was unable to dispute its price discrimination, but argued that Stelwagon did not compete with the favored distributors. Stelwagon introduced evidence of its direct competition with the favored distributors and proved damages flowing from Tarmac's unlawful price discrimination by (1) expert analysis resting on traditional economic theory applicable to Stelwagon's distribution business and based on Stelwagon's financial data comparing its MAPs and total sales before, during and after the period of price discrimination; and (2) testimony by Stelwagon's sales force that it lost Tarmac MAPs sales because Stelwagon's competitors had a lower price.

On December 21, 1993, the jury returned a verdict in favor of Stelwagon and awarded damages of $772,000 for price discrimination and $1,500,000 for breach of contract. On December 23, 1994, pursuant to Section 4 of

the Clayton Act, the District Court trebled the antitrust damages and entered judgment in the total amount of $3,816,000.

Tarmac filed a post-trial motion for judgment as a matter of law, or in the alternative, for a new trial or remittitur. On September 12, 1994, the District Court denied Tarmac's motion for judgment, finding sufficient evidence to support the jury's verdict and no legal error. App. 24a-44a. With respect to the requested remittitur, the District Court reduced the award of antitrust damages to $450,383.50 (before trebling) and contract damages to $72,242, finding sufficient evidence to support those amounts. App. 42a-44a. Stelwagon accepted the remittitur on September 23, 1994. Tarmac's appeal to the Third Circuit followed.

The Third Circuit affirmed the jury's and District Court's conclusion that Stelwagon "successfully proved that Tarmac's discriminatory pricing scheme violated the Robinson-Patman Act."[1] App. 23a. However, the Court vacated the jury's award (after remittitur and trebling) of $1,351,150.50, and left Stelwagon empty-handed. The Third Circuit allowed Tarmac to evade the consequences of its unlawful scheme because Stelwagon failed to produce "direct evidence of injury." App. 11a (emphasis in original).

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[1]The Judgment also affirmed the District Court's entry of judgment in favor of Stelwagon on its breach of contract claim in the amount of $74,242 after remittitur. App 22a-23a.

REASONS FOR GRANTING THE WRIT

The Third Circuit's "direct evidence" requirement is unprecedented in the cases decided by this Court. On the contrary, it abrogates the "traditional rule," repeatedly espoused by this Court, which permits reasonable inferences of antitrust damages. Proof sufficient to satisfy Section 4 of the Clayton Act has always been excused from any "unduly rigorous standard." J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 565 (1981).

Most recently, in Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), a case not mentioned in the Third Circuit's Opinion, much less distinguished, this Court reaffirmed the "traditional rule":

> "'[D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' Bigelow v. RKO Pictures, Inc., [327 U.S. 251, 264, 66 S.Ct. 574, 579 (1946)].

> See also Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-379, 47 S.Ct. 400, 404-405, 71 L.Ed. 684 (1927); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566, 51 S.Ct. 248, 250-252, 75 L.Ed. 544 (1931).' Zenith Radio Corp. v. Hazeltine Research, Inc. [395 U.S. 100, 123-4, 89 S.Ct. 1562, 1576-7 (1969)]." Id. at 573 n. 31 (quoting J. Truett Payne, supra, 451 U.S. at 565-6).

The Court applied this traditional rule in Hasbrouck and expressly allowed a reasonable inference of antitrust damage -- without any direct evidence of diversion to a favored competitor -- based on circumstantial evidence, including a decline in plaintiffs' sales and profits.

Nowhere in this Court's opinions in J. Truett Payne, Hasbrouck or elsewhere is there any support for a requirement of "direct evidence" as a prerequisite to a treble damage award. The Third Circuit's departure from the traditional and established rule inexplicably ignores the evidence, expert analysis and reasonable inferences that the jury and the District Court found sufficient to support the damage award; that is, during the period of unlawful price discrimination, Stelwagon's sales and profits on MAPs lagged far behind its sales and profits on other products in which it competed fairly with the same distributors. Stelwagon's expert concluded that under the circumstances the unlawful price discrimination caused the loss of sales and profits. Stelwagon also proved

the fact of antitrust damage with evidence of lost sales and customer statements of their reasons for failing to buy from Stelwagon, a form of evidence which other Courts of Appeal have accepted as proof of lost sales in similar contexts.

With no definition of what the new "direct evidence" standard requires, antitrust plaintiffs in the Third Circuit are left to speculate as to what proof will be sufficient to prove antitrust damages. What the Third Circuit suggests, albeit obliquely, is that such evidence may include the testimony of former customers of the disfavored distributors or documents like invoices or bills of sale from the favored distributors to former customers of the disfavored distributor. App. 15a. But in retail customer markets, like the one presented in Hasbrouck and this case, such evidence may not be available. If "direct evidence" were required, plaintiffs in Hasbrouck would have been unable to sustain their burden of proof, since their lost customers were itinerant purchasers of gasoline.

This case was not just wrongly decided. Rather, the Third Circuit's elimination of the rule allowing reasonable jury inferences builds an unprecedented barrier to proof of antitrust damages under Section 4 of the Clayton Act. Nor is this a factual dispute over evidence, although the Third Circuit's improper de novo evaluation of Stelwagon's evidence, contrary to that of the jury, is important and should be addressed. The negative impact of the Third Circuit's decision goes far beyond reversal of a jury verdict in Stelwagon's favor and even the Robinson-Patman Act itself.

The issuance of a writ of certiorari is imperative to maintain the integrity of this Court's precedent and to guarantee the continued vitality of private causes of action under federal antitrust laws, the importance of which this Court has long and often recognized. In Hawaii v. Standard Oil Company of California, 405 U.S. 251, 262 (1972), the Court noted:

> "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve a 'private attorneys general.'" (Citations omitted.)

In practice, private enforcement of antitrust laws has been made essential by the limited historic role of government enforcement, particularly with respect to the Robinson Patman Act. See Daniel A. Gifford, The Jurisprudence of Antitrust, 48 SMU L.Rev. 1677, 1692 (1995)("Today the government is a minor actor in the litigation of antitrust cases.... At least since the early 1970s, antitrust caselaw has been created almost entirely in private actions."); Terry Calvani and Gilde Breidenbach, An Introduction to the Robinson-Patman Act and Its Enforcement by the Government, 59 Antitrust L.J. 765, 772 (1991)("Beginning in the early 1970s, there began a definite trend away from [government enforcement in Robinson-Patman Act] cases that were quantitatively insubstantial.")

This Court has not hesitated to grant writs of certiorari when decisions of the Courts of Appeal conflict with established precedent and threaten the ability of private plaintiffs to enforce the antitrust laws. For example, in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Court reversed on several grounds a decision by the Court of Appeals:

> "Because these rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari." Id. at 136.

See Perkins v. Standard Oil Company of California, 395 U.S. 642, 644 (1969)("We granted certiorari to determine whether the Court of Appeals, in reversing the judgment,

had correctly construed the Robinson-Patman Act."); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962) ("Certiorari was granted, limited to issues which required examination in the light of previous decisions of this Court and which presented important questions under the antitrust laws."); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 254 (1946)(in a Sherman Act case where Court of Appeals vacated jury verdict on the "sole ground that the evidence of damage was not sufficient for submission to the jury," Court granted certiorari "because of the importance of the problem presented").

I. Expert Evidence Based On Traditional Economic Principles And Plaintiff's Financial Data Demonstrating Diminished Sales And Profits Is Sufficient To Establish Antitrust Injury And Damages.

The Third Circuit concluded, based on its stringent, non-traditional standard, that Stelwagon had not presented "direct evidence" of antitrust damage. To the contrary, under the traditional rule consistently applied by this Court, Stelwagon's evidence clearly was sufficient to support the jury's verdict.

It is undisputed that Stelwagon's MAPs sales declined versus the rest of its roofing business during the specific period of Tarmac's unlawful discrimination. To establish antitrust injury, Stelwagon presented the expert economic analysis of Dr. Martin Perry. Dr. Perry analyzed Stelwagon's competitive market, examined the discriminatory prices received by Stelwagon's competitors and evaluated the

negative impact of those prices on Stelwagon's MAPs business during the period of unlawful discrimination. The Third Circuit agreed with the District Court that Dr. Perry's testimony and report was admissible, but concluded that it was insufficient to support the jury's verdict. App. 14a.

Based on the data and applying his expertise in economic market analysis, Dr. Perry quantified Tarmac's price discrimination in favor of Stelwagon's competitors, which ran as high as 25% and lasted for over three years. This discrimination conveyed significant competitive advantages to the favored distributors. Dr. Perry noted that a distributorship market such as that for MAPs -- a fungible product resold with no alteration -- is characterized by price elasticity. Lower prices are an important competitive factor, and it would be expected for a distributor enjoying lower wholesale prices of such a magnitude to lower its retail prices in order to attract new customers from competing distributors.

Dr. Perry's analysis of the effect of Tarmac's unlawful price discrimination on Stelwagon's MAPs business was firmly rooted in Stelwagon's actual sales of MAPs and other products before, during and after Tarmac's price discrimination. His examination confirmed that the price discrimination caused Stelwagon's declining sales of Tarmac's MAPs and declining total MAPs sales during the specific period of price discrimination, as compared to other aspects of Stelwagon's business in which it

did not suffer price discrimination.[2] The rapid acceleration of Stelwagon's MAPs sales after it began promoting a new line of MAPs corroborated his conclusions about the distribution market for MAPs.

This expert evidence, grounded in empirical financial data and classical economic analysis, is sufficient proof of antitrust damages. Yet, the Third Circuit found that Dr. Perry's evidence, standing alone, was "insufficient to support the finding of actual damage." App. 14a. The rejection of this evidence, which mandates the grant of certiorari, follows from the Third Circuit's erroneous holding that "direct evidence of injury" is required to support a treble damages award. App. 11a. Such a standard inexorably leads to the mistaken conclusion that though a plaintiff successfully proves unlawful price discrimination and lower sales and profits on the product in question during the precise period of that discrimination, it only can recover antitrust damages by specifically identifying lost sales if it did not reduce its own resale prices to compete (as Stelwagon did not). See App. 15a ("Not only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale price, it also failed to identify a single lost customer.") In effect, even though the Third Circuit acknowledged that Dr. Perry's evidence is admissible, it gave that evidence no weight,

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[2]Both before and after the period of price discrimination, Stelwagon's MAPs sales followed the same trend as its sales of other products.

contrary to the repeated decisions of this Court.

In Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), independent gas retailers brought an action against Texaco for price discrimination in favor of two distributors. As in this case, there was absolutely no specific evidence of lost sales as to one of the favored distributors ("Gull"), as plaintiffs "offered no direct testimony of any diversion to Gull and testified that they did not even know that Gull was being supplied by Texaco." Id. at 572 (emphasis added). Addressing this fungible good market where customer identification was difficult at best, the Court found proof virtually identical to Stelwagon's satisfactory:

> "The proof established that Texaco's lower prices to Gull and Dompier were discriminatory throughout the entire 9-year period; that at least Gull, and apparently Dompier as well, was selling at retail during that entire period; that the discounts substantially affected competition throughout the entire market; and that they injured each of the [retailers]. There is no doubt that [the retailers'] proof of a continuing violation of the Act throughout the 9-year period was sufficient." 496 U.S. at 572.

The plaintiff retailers presented expert economic analysis comparing their actual prices, volumes and profits to an estimate of sales absent the effect of discrimination

based on several assumptions, and estimating damages for sales made by the favored competitors to independent retailers with whom plaintiffs directly competed. Though this expert analysis was clearly hypothetical, did not specify individual lost sales and did not even consider the factor of legal price competition among retailers, this Court held such evidence sufficient to sustain the jury's award of treble damages, noting that Texaco's attack "improperly blur[red] the distinction between the liability and the damages issues":

> "Proof of the specific amount of [the retailers'] damages was necessarily less precise. Even if some portion of some of [their] injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages." Id. (emphasis added).

The Third Circuit's requirement of "direct evidence" is squarely at odds with not only Hasbrouck, but also with this Court's consistent precedent under Section 4 of the Clayton Act. E.g. J. Truett Payne Co., Inc. v. Chrysler Motors Corp., supra, 451 U.S. at 565-6 (a Robinson-Patman Act case, where this Court explicitly rejected any requirement of "direct evidence" of antitrust damage and confirmed the factfinder's ability to draw "just and reasonable" inferences from "evidence of the decline in prices, profits and values").

In Perkins v. Standard Oil Company of California, 395 U.S. 642, 649 (1969), another Robinson-Patman Act case, this Court found proof of damages strikingly similar to this case sufficient to support an inference of causation and antitrust damages:

> "[T]here was substantial evidence from which the jury could infer causation. There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act."

In Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946), a Sherman Act case relied on by this Court in Hasbrouck and J. Truett Payne, theater owners sought to recover antitrust damages flowing from defendants' unlawful conspiracy to control the release of certain movies to competing theaters. Plaintiffs offered two classes of evidence to establish damages: (1) a comparison of their earnings with those of

the favored competitors, and (2) a comparison of their receipts and profits for the periods before, during and after the conspiracy. The Court found that "each of the two classes of evidence ... tended to show damage," id. at 260, and held that the lack of any more direct or precise proof did not preclude the jury's award:

> "[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as [upon] direct and positive proof.' Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain.
>
> "Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." Id. at 264-5 (citations omitted, emphasis added).

The second type of proof found sufficient in Bigelow is the same as the proof presented by Stelwagon and rejected by the Third Circuit.

In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), Zenith sought treble damages as a result of an

unlawful conspiracy to exclude it from foreign markets through patent pools. The Court found that the jury could reasonably infer damages from evidence of Zenith's success in markets where it was not subject to such unlawful exclusion:

> "Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. [The Canadian patent pool] was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." Id. at 124-5 (emphasis added).

In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), plaintiff alleged that defendants unlawfully conspired to monopolize the market for certain ores, ultimately eliminating

plaintiff from the business. The Court of Appeals for the Ninth Circuit concluded that plaintiff failed to produce evidence to support a finding that defendants' illegal conduct caused plaintiff's business failure. This Court reversed, focusing on the Court of Appeals' usurpation of the jury's function to draw reasonable inferences of antitrust damages:

> "Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'
>
> "During the so-called Van-Ex period, the court did not exculpate respondents because of petitioners' failure to request oxide from them but because petitioners supposedly failed to take advantage of an independent source of supplies. But the evidence relied upon by the court can just as reasonably be read in a manner favorable to Continental and it appears that the court may have misapprehended significant parts of the record. In any event, the interpretation and significance of the this evidence were for the jury." Id. at 700-701 (citation and footnote omitted.)

In none of these cases did the Supreme Court require "direct evidence" of antitrust damage. Quite to the contrary, circumstantial evidence and reasonable inferences, virtually identical to the evidence presented in this case, were sufficient. This Court has repeatedly held that proof of antitrust damages, and specifically the causal connection between price discrimination and damages, may be sustained by evidence of a "decline in prices, profits and values" supporting a "just and reasonable inference." Stelwagon's actual sales data, and Dr. Perry's analysis, clearly met that requirement.

The Third Circuit, however, improperly engaged in an assessment of the weight of the evidence, speculating that Stelwagon's MAPs sales during the period of discrimination "may have been lost for reasons apart from price discrimination." App. 14a (emphasis added). Contrary to that speculation, Dr. Perry testified that he controlled for those other reasons in his methodology by comparing Stelwagon's MAPs business to its business in other products. By re-evaluating the evidence, whether circumstantial or direct, the Third Circuit nullified the function which this Court has zealously reserved for the jury -- the ability to infer antitrust damages from circumstantial evidence.

An antitrust plaintiff, like Stelwagon, simply is not required to show that an unlawful scheme was the sole cause of its injuries, or even a greater cause than other factors. A plaintiff is only required to show that its injury to some degree resulted from the violation. Falls City Industries,

Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437 (1983)("[i]f some of [plaintiff's] injury was attributed to price discrimination, [the defendant] is responsible to that extent"); Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. at 114 n.9 ("plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable [antitrust] injury"). It is the burden of the defendant to prove that such damages are entirely attributable to other causes. See J. Truett Payne Co., Inc., supra at 564.

The Third Circuit's de novo conclusion that the record established that Stelwagon had higher overhead or "other business complications" which "may" have contributed to reduced MAPs sales (App. 14a-15a) therefore is not a legally sufficient basis to overrule the jury's award,[3] or to reject Dr. Perry's evidence, which was properly admitted into evidence. The jury clearly was entitled to conclude, without any direct evidence of lost sales, that Dr. Perry's

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[3]The inappropriateness of the Third Circuit's de novo evaluation of Dr. Perry's analysis is underscored by the undisputed fact that his model did control for "overhead" or other business factors which affected Stelwagon's entire business by accounting for Stelwagon's overall business growth during the period of discrimination. Dr. Perry explained how these variables were considered in his analysis, as Tarmac offered no evidence that such complications uniquely affected Stelwagon's MAPs business.

evidence was credible and persuasive, and tended to support -- measured against Stelwagon's declining "profits and values" in the MAPs business -- a "just and reasonable inference" of antitrust damage "from the proof of [Tarmac's] wrongful acts and their tendency to injure [Stelwagon's] business." See Hasbrouck, supra at 573 n.31 (citations omitted).

The Third Circuit's decision will dramatically limit the recovery of treble damages to those few cases where specific lost sales can be identified and linked with discriminatory pricing, and all alternative causes can be affirmatively disproved. Left to stand contrary to precedent, the Third Circuit's Opinion will invite other courts to require "direct evidence" of lost sales, vacate jury awards on the basis of other potential causes of injury, and further erode decades of this Court's reasoning. The viability of private antitrust actions, and the historic and salutary role of private plaintiffs as private attorneys general, requires this Court's review.

II. Anecdotal Evidence Of Lost Sales Is Admissible Under The Federal Rules Of Evidence And Sufficient To Prove Antitrust Injury And Damages.

Besides the expert evidence of Dr. Perry, Stelwagon proved antitrust injury with testimony of sales personnel establishing that Stelwagon lost sales of Tarmac MAPs due to low retail prices offered by favored competitors. Presumably, this would have constituted "direct evidence" to satisfy the Third Circuit's departure from the traditional rule. But the Third Circuit

avoided this evidence by ruling that it was inadmissible hearsay for this purpose.

In many markets, the nature of competition makes it inherently difficult to link price discrimination with specific lost customers, or to even identify those customers. The facts of Hasbrouck provide a good example. The Third Circuit's mis-analysis would require a gasoline retailer to identify those drivers who patronized a favored competitor, and would prevent the service station attendant from testifying about complaints from customers, known or anonymous.

This aspect of the Third Circuit's decision is contrary to other decisions in the Courts of Appeals, including a prior Third Circuit decision, which specifically approved the use of virtually the same anecdotal evidence of lost sales as relevant to actual damages.

In J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991), the Third Circuit held that anecdotal hearsay evidence of a former customer's explanation why it no longer purchased from a distributor was admissible under F.R.E. 803(3). Feeser involved price discrimination by a food products manufacturer in favor of distributors who competed with plaintiff. Plaintiff presented expert testimony analyzing the extent of price discrimination, and anecdotal testimony concerning lost sales resulting from its inability to match the favored competitor's prices:

> "Generally, the sales people testified concerning transactions with a number of their end user customers when they either lost sales of Serv-A-Portion products to Weis Markets [the favored competitor] or were forced to greatly reduce their prices of the products, because of their inability to match their competitor's prices.
>
> * * *
>
> "Although this does not constitute direct testimony from the salesmen that Serv-A-Portion's pricing policies favored [the competitor] and were detrimental to Feeser's ability to sell Serv-A-Portion's products, this is a reasonable inference which must be drawn in Feeser's favor." 909 F.2d at 1535-6.

The Feeser Court found such evidence, independent of similar testimony from certain of Feeser's customers which may have been "more persuasive," sufficient to raise a reasonable inference of "competitive injury." Id. at 1537. The Court confirmed that the salesmen's testimony of lost sales went "well beyond the level of speculative injury unprotected by [the Act]," and was sufficient to create a question for the jury as to damages. Id.

Stelwagon presented similar anecdotal evidence of numerous customer complaints about Stelwagon's MAPs pricing and statements that customers did not purchase

from Stelwagon due to lower prices available from the favored distributors. For example, when Stelwagon's Vice President inquired why a customer was not buying MAPs from Stelwagon, he was told "I had to be out of my mind for asking the prices that I was asking for the same [MAPs]" and that contractors were buying from favored distributors at Stelwagon's cost.[4]

The Third Circuit rejected this evidence as improper hearsay to the extent it was relied upon to show anything but customer motives. However, in Feeser, the Third Circuit expressly held that such evidence is admissible in the context of price discrimination claims as a hearsay exception under F.R.E. 803(3), with regard to both competitive injury and antitrust damage:

> "The reason why a customer was not doing business with a particular seller is relevant in a lost profits/sales inquiry and its causal connection to the pricing practices of the alleged violator. If Feeser was losing sales or was being forced to cut its selling prices and thereby reducing its profits to meet Weis' price, this is directly

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[4]Contrary to yet another de novo evidentiary conclusion by the Third Circuit -- that Stelwagon "failed to identify a single lost customer," App. 15a -- Stelwagon's witnesses identified at least nine specific customers in connection with similar statements.

related to actual injury." Id. at 1535 n.11.

The Third Circuit's attempts to harmonize its ruling with Feeser cannot stand.[5] Although Feeser was decided in the context of an improvidently granted summary judgment, its clear conclusion, as cited directly above, is that such anecdotal evidence is admissible at trial and relevant to prove actual damages. Thus, the Third Circuit's suggestion that Feeser was rooted in the notion that "[p]resumably, Feeser would have been able to produce the customers at trial" (App. 13a n.17), or that something more was required to render this evidence admissible, is clearly wrong. Furthermore, the testimony of Stelwagon's Vice President and other sales personnel that customers stopped buying from Stelwagon was not hearsay. The only hearsay was the customers' out of court declarations concerning the reason why they stopped buying, but such statements are admissible under F.R.E. 803(3).

The decisions cited by the Third Circuit from other Courts of Appeal cast no doubt on Feeser, as they merely hold that such anecdotal evidence cannot be used to prove the fact of price discrimination itself. Here, however, the Third Circuit agreed that Stelwagon "successfully proved that Tarmac's pricing scheme violated the Robinson-Patman Act." App. 23a.

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[5]Circuit Judge Carol Los Mansmann, who authored Feeser, voted for rehearing in this case.

Moreover, one of the decisions cited by the Third Circuit is expressly to the contrary. In Grove Fresh Distributors, Inc. v. New England Apple Products Co., Inc., 969 F.2d 552 (7th Cir. 1992), a Lanham Act case, plaintiff offered hearsay statements made to salesmen by former customers that they switched to the defendant's juices because they were cheaper. The Seventh Circuit held that such statements could not be offered to prove the fact of underpricing, but were competent to "establish that the customers switched from Grove Fresh juice to Veryfine juice." Id. (emphasis added).

Here, non-hearsay established Stelwagon's lost sales. Under F.R.E. 803(3), the District Court properly admitted the reasons for those lost sales, at least in the minds of the disaffected customers. The Third Circuit's rejection of that evidence is contrary to the plain meaning of F.R.E. 803(3).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted, the Third Circuit's Judgment should be reversed, and the District Court's Order dated September 12, 1993 should be reinstated as final judgment.

Respectfully submitted,

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December 22, 1995

APPENDIX A

Filed August 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2004

STELWAGON MANUFACTURING COMPANY

Appellee,

v.

TARMAC ROOFING SYSTEMS, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 92-cv-01073)

ARGUED MAY 16, 1995

BEFORE: COWEN, LEWIS, GARTH, *Circuit Judges.*

(Filed August 24, 1995)

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

Appellant Tarmac Roofing Systems, Inc., ("Tarmac") appeals a $1,423,392.50 judgment entered after a jury trial in the United States District Court for the Eastern District of Pennsylvania on appellee Stelwagon Manufacturing Company's ("Stelwagon") secondary line price discrimination and state breach of contract claims.[1] Specifically, the jury found that Tarmac had discriminated against Stelwagon on the basis of price in violation of section 2(a) of the Clayton Act (commonly referred to as the Robinson-Patman Price Discrimination Act), 15 U.S.C. § 13(a) (1982),[2] and, accordingly, that Stelwagon was entitled to recover treble damages pursuant to section 4 of

1. Secondary line cases involve discrimination affecting competition among customers of the discriminating seller. *Barr Laboratories, Inc. v. Abbott Laboratories, Inc.*, 978 F.2d 98, 106 (3d Cir. 1992); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1526 (3d Cir. 1990).

2. Section 2(a) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

the Clayton Act, 15 U.S.C. § 15(a).[3] The jury also determined that Tarmac breached an oral, exclusive distributorship agreement with Stelwagon. Although we believe that Stelwagon established a *prima facie* violation of the Robinson-Patman Act, we believe it failed to present sufficient proof of actual antitrust damages and is, therefore, precluded from recovering damages under the Clayton Act. Accordingly, we will vacate the district court's judgment insofar as it awards Stelwagon treble damages under section 4 of the Clayton Act. We will, however, affirm with respect to the breach of contract claim because we believe the district court correctly concluded that the contract claim was not barred by the Statute of Frauds.

I. *BACKGROUND*

Stelwagon is a wholesale distributor of roofing, siding and related construction materials. Its principal customer base consists of small to medium-sized roofing contractors located in the Philadelphia, Pennsylvania, area. In early 1988, Stelwagon entered into an oral, exclusive distributorship agreement with Tarmac, a Wilmington, Delaware-based manufacturer of modified asphalt products ("MAPs").[4] Under the agreement, Tarmac agreed not to sell its MAPs to any other distributors in the Philadelphia area except for Roofer's Mart, Inc., a pre-existing distributor.[5] In

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3. Section 4 of the Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . .

4. MAPs are polyester or fiberglass mats applied by torch or hot asphalt which are sold by the roll and principally used to cover flat roofs.

5. Tarmac insists that the terms of the contract provided for sales to Stelwagon and one other distributor, and consequently, if Roofer's Mart discontinued selling Tarmac MAPs, Tarmac could sell to another distributor. This distinction is significant because Roofer's Mart's Philadelphia warehouse burned down in late 1989 and Tarmac began selling MAPs to Allied Roofing Products ("Allied"), another Philadelphia distributor.

Because we believe that the evidence, viewed in the light most favorable to the prevailing party, provides a rational basis for the jury's factual finding that the terms of the contract are, in fact, those terms that Stelwagon allege, we will not disturb that finding. *See Intermilo, Inc. v. I.P. Enterprises, Inc.*, 19 F.3d 890, 892 (3d Cir. 1994).

return, Stelwagon promised to promote and develop a market for Tarmac MAPs.

In 1988, Stelwagon began actively promoting Tarmac MAPs as agreed. In order to build a demand for Tarmac's products, Stelwagon refrained from acquiring any new lines of MAPs, and ceased aggressive marketing of its other, non-Tarmac MAPs. Stelwagon sold Tarmac MAPs without incident in the relationship until early 1989, when Stelwagon became aware of sales made to several of its competitors in violation of the agreement.[6] At around the same time, Stelwagon also learned that Tarmac was selling MAPs to two competitors — Standard Roofing Company ("Standard") and Celotex Corporation ("Celotex") — at preferential prices. Stelwagon first complained to Tarmac about these sales, and eventually brought this action in February 1992.

At the close of Stelwagon's case, and again at the close of all evidence, Tarmac moved for judgment as a matter of law. Both of these motions were denied and the case was submitted to the jury, which rendered a verdict in Stelwagon's favor on both the price discrimination and breach of contract claims, and awarded damages in the amount of $2,272,000.[7] The district court trebled the antitrust damages under section 4 of the Clayton Act, and entered judgment for Stelwagon in the amount of $3,816,000. Tarmac renewed its motion for judgment as a matter of law and, alternatively, for a new trial. The district court denied the motions, but granted Tarmac's request for a remittitur based on a finding that "the damages awarded by the jury in this case are unsupported by the evidence and are grossly excessive." *Stelwagon Manufacturing Company v. Tarmac Roofing Systems, Inc.*, 862 F. Supp. 1361, 1369 (E.D. Pa. 1994). The district court reduced the damages award for breach of contract to $74,242, and

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6. Stelwagon first became aware of Tarmac's sales to Sellmore Roofing in Philadelphia, and later learned that Tarmac was selling MAPs to BJ Supply Company and Allied Roofing Co., one of Stelwagon's principal competitors in Philadelphia.

7. The jury awarded Stelwagon $1,500,000 in damages for breach of contract and an additional $772,000 for the antitrust violation.

likewise reduced the antitrust damages to $450,383.50. After trebling the Robinson-Patman damages, the district court entered judgment for Stelwagon in the amount of $1,423,392.50. This appeal followed. We have jurisdiction under 28 U.S.C. § 1291.

On appeal, Tarmac challenges the district court's denial of its post-trial motions. Specifically, Tarmac claims that the judgment should be reversed because Stelwagon failed to present sufficient evidence to (1) establish a *prima facie* Robinson-Patman violation; (2) prove actual antitrust injury; and (3) support the award of damages under the Clayton Act. Tarmac also argues that Stelwagon's breach of contract claim is barred by the statute of frauds.[8] Our review of the district court's denial of Tarmac's motion for judgment as a matter of law is plenary. *Intermilo, Inc. v. I.P. Enterprises, Inc.*, 19 F.3d 890 (3d Cir. 1994). The legal foundation for the factfinder's verdict is reviewed de novo while the factual findings are reviewed to "determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." *Id.*, quoting *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987).

II. *THE ROBINSON-PATMAN CLAIM*

By its terms, the Robinson-Patman Act is a prophylactic statute and does not require that the alleged discrimination must in fact have harmed competition. *J. Truett Payne Company, Inc. v. Chrysler Motor Corporation*, 451 U.S. 557, 561 (1981). Instead, a violation is established upon a showing that "the effect of such discrimination may be substantially to lessen competition." *Id.* For the purposes of the Robinson-Patman Act, price discrimination means nothing more than a difference in price charged to different purchasers or customers of the discriminating seller for products of like grade or quality. *Feeser*, 909 F.2d at 1532; *see also F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). Price discrimination standing alone, however, is not

8. In the alternative, Tarmac raises various trial errors which it argues require reversal. Because of our decision on the merits, however, we need not reach the remainder of Tarmac's claims.

illegal *per se*. *Feeser*, 909 F.2d at 1532; *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 346 (3d Cir. 1981). Rather, in order to establish a *prima facie* violation of section 2(a), "a reasonable possibility of harm, often referred to as competitive injury, must be shown." *Feeser*, 909 F.2d at 1531.

A. *Competitive Injury*

1.

We note initially that as a prerequisite to establishing secondary line injury, a plaintiff must "first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." *Best Brands Beverage, Inc. v. Falstaff Brewing Corporation*, 842 F.2d 578, 584 (2d Cir. 1987). Moreover, to satisfy this "competitive nexus" requirement, it "must be shown that, as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." *Id.* at 585.

Tarmac claims that Stelwagon failed to show the requisite competitive contact with either Standard or Celotex and, as a result, did not establish a *prima facie* violation of the Robinson-Patman Act. Specifically, Tarmac argues that Stelwagon was not in competition with Standard because Standard operated its business outside of the geographical area where Stelwagon's principal customer base was located, and that Stelwagon was likewise not in competition with Celotex because the two companies did not operate at the same functional level, i.e., that they did not compete at the same distribution level because Celotex is a manufacturer and Stelwagon a distributor. The district court rejected these contentions and concluded that the record contained sufficient evidence to support a finding that both Standard and Celotex were in head-to-head competition with Stelwagon. We agree.

Standard is a distributor of roofing products and its customer base is similar to that of Stelwagon's. Although

Standard is located in Trenton, New Jersey, there was evidence that Standard employed salespeople in Philadelphia and that it shipped directly to its Philadelphia customers from south Jersey. There was additional evidence that Standard was a principal competitor of one of Stelwagon's Philadelphia locations as well as Stelwagon's Camden, New Jersey location. In our view, this evidence was sufficient to support a finding of competitive contact between Stelwagon and Standard.

With respect to Celotex, we, too, reject the argument advanced by Tarmac that the weight of the evidence supports the conclusion that Celotex was not in competition with Stelwagon. The basis of Tarmac's argument, as mentioned above, is that the two companies were not operating at the same functional level and were, therefore, not competing customers for purposes of the Act. *See F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 348-49 (1968).

It is undisputed, however, that the MAPs sold by Celotex, under its own private label, were, in fact, "manufactured," that is, made, by Tarmac. It is also uncontested that the MAPs Tarmac produced for Celotex were identical to those Tarmac sold to Stelwagon except that they did not bear the Tarmac label. Although there was evidence that tended to support Tarmac's characterization of Celotex as a manufacturer,[9] the fact that there were conflicts and contradictions is of little significance, since the resolution of such inconsistencies is peculiarly within the province of the jury. In our view, the record as a whole contains sufficient evidence to support the jury's finding, in the first instance, as well as the district court's conclusion thereafter, that Celotex "was in economic reality acting on the same distribution level as Stelwagon." *Stelwagon*, 852 F.2d at 1368.

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9. For example, there was testimony from witnesses for both parties that Celotex was widely thought of and referred to as a manufacturer. In addition, there was evidence that, like a manufacturer, Celotex sold the private label MAPs to distributors who, like Stelwagon, sold MAPs to contractors and homeowners.

Once the existence of a competitive relationship has been established, "[i]njury to competition is usually shown in either of two ways: proof of lost sales or profits, *Falls City Industries [Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983)]; *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987), or under the *Morton Salt* test, proof of a substantial price discrimination between competitors over time." *Feeser*, 909 F.2d at 1535. In this case, the district court concluded that "[t]he record . . . contains evidence that would support a jury finding of harm to competition under either method." *Stelwagon*, 862 F. Supp at 1368. We thus turn to the specific evidence Stelwagon presented at trial to determine whether the record is indeed sufficient to support a finding of competitive injury.

(a) Substantial Price Discrimination Over Time

It is undisputed that a differential existed between the prices Tarmac charged Stelwagon for its MAPs and the prices Tarmac charged Standard and Celotex. In addition, Stelwagon presented evidence that showed the price differential was substantial and that it was in effect for several years. From this evidence, we believe the jury was entitled to infer harm to competition for, as the Supreme Court stated in *Morton Salt*, "we believe [it is] self-evident [] that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper that they sell like goods to the competitors of these customers." *Morton Salt*, 334 U.S. at 50-51. Because the amount and degree of the price discrimination are significant factors to be considered when determining whether a price differential is substantial, *Feeser*, 909 F.2d at 1538, we will first address the evidence in this case that pertains to the issue of substantiality.

Stelwagon presented a report submitted by its expert, Dr. Martin Perry.[10] The report, insofar as it concerned the

10. The district court qualified Dr. Perry as expert "in the general field of economics and specifically in the field of price discrimination, damages flowing therefrom, as well as damages flowing from breach of distribution agreements." App. at 476.

substantiality of the price differentials, was based on Dr. Perry's examination of Tarmac's invoices on sales of MAPs manufactured at its plant in Chester, Pennsylvania. App. at 77. The invoices, which included the date of sale, distributor, product name, number of rolls and price charged, covered a period from 1987 through late 1991 and included sales of six types of Tarmac MAPs to Stelwagon and seven other distributors which, at the time, resold MAPs in the Philadelphia area.[11] App. at 81-82.

According to the expert report, between 1988 and 1991, Standard received prices ranging from 5 to 20 percent lower than the prices charged to Stelwagon and, during this same period, Celotex received prices which ranged from 10 to 25 percent lower than the prices Tarmac charged to Stelwagon. App. to 88-93 and 108-122. With respect to APP 4S, the Tarmac product which accounted for 40.4 percent of the total unit sales of all products included on the invoices, Standard received a 12.5 percent discount relative to the price paid by Stelwagon, while Celotex received a discount of at least 10 percent. App. 81 and 90-91. Based on these figures, we believe the price differential Tarmac offered Standard and Celotex only can fairly be characterized as substantial.[12]

Because we agree with the district court that Stelwagon offered sufficient proof of a substantial price difference over time, which alone suffices to establish a violation of the Robinson-Patman Act, we need not address the issue of whether Stelwagon presented sufficient proof of lost sales or

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11. Of the seven distributors, we are concerned only with sales to Standard and Celotex for the purposes of this appeal.

12. Another compelling factor considered by courts in determining competitive injury in secondary line cases is the duration of the price discrimination. *Feeser*, 909 F.2d at 1539. Generally, the longer the duration, the more likely injury will be found. *Id.*, citing *Rose Confections*, 816 F.2d at 385 (two years); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987) (four years). In our view, the four-year period analyzed by Dr. Perry's report establishes the requisite duration of price discrimination and further supports an inference of competitive injury.

profits insofar as such evidence pertains to establishing a violation of the Act.[13]

B. *Antitrust Damages*

As we stated in *Feeser*, "[d]emonstrating competitive injury as part of a *prima facie* case suffices to support injunctive relief and implicates further examination of a plaintiff's entitlement to treble damages under section 4 of the Clayton Act." *Feeser*, 909 F.2d at 1531; however, to recover such damages, "a plaintiff must establish cognizable injury attributable to [the] antitrust violation and some approximation of damage." *J. Truett Payne*, 451 U.S. at 561. In other words, a plaintiff must prove a causal connection between the price discrimination and actual damage suffered.[14] *Feeser*, 909 F.2d at 1539, citing *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). Traditionally, however, antitrust plaintiffs have not been held to an unduly rigorous standard of proving antitrust injury. *J. Truett Payne*, 451 U.S. at 565. Because

> damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts[, t]he [Supreme] Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just

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13. As discussed below, we do not believe Stelwagon offered sufficient evidence of lost sales or profits to prove actual antitrust damages, and is therefore not entitled to treble damages under section 4 of the Clayton Act.

14. The Supreme Court has described these two requirements collectively as "antitrust injury":

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research[, Inc.]*, 395 U.S. [100,] 125 [(1969)].

Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977); *see J. Truett Payne*, 451 U.S. at 489.

> and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Pictures, Inc.*, [327 U.S. 251, 264 (1946)]. *See also Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-79 (1927); *Story Parchment Co. v. Patterson Parchment Paper, Co.*, 282 U.S. 555, 561-566 (1931).

J. Truett Payne, 451 U.S. at 565-66, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969). Although the proof requirements of section 4 are "less than stringent," *Feeser*, 909 F.2d at 1540, there must be some *direct evidence* of injury to support an award of damages. *See id.*; *S&W Construction and Materials Co., Inc. v. Dravo Basic Materials Co., Inc.*, 813 F. Supp. 1214, 1221 (S.D. Miss. 1992); *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 581-82 (5th Cir. 1982).

Tarmac claims that Stelwagon failed to show it suffered actual antitrust injury as a result of the price discrimination. Specifically, Tarmac claims that Stelwagon fell short of proving (1) that it actually suffered lost sales and profits; (2) that any proven lost sales and profits were caused by Standard and/or Celotex receiving favorable prices; and (3) the amount of the sales and profits that Stelwagon lost. The district court, however, found that "the testimony of Dr. Perry and the anecdotal evidence of [Stelwagon's] customer's statements, admitted under the state of mind hearsay exception, . . . establish[ed] that [Stelwagon] actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368. For the reasons discussed below, we disagree.

1. Anecdotal Evidence

The district court admitted — under Federal Rule of Evidence 803(3) (and over Tarmac's standing objection) — the hearsay testimony of Stelwagon employees about out-of-court conversations with Stelwagon customers.

Essentially, the testimony was that the customers could and did purchase Tarmac MAPs from Standard at prices lower than Stelwagon's prices.

Statements that are considered under the exception to the hearsay rule found at Fed. R. Evid. 803(3),[15] commonly referred to as the "state of mind" exception, cannot be offered to prove the truth of the underlying facts asserted. *Grove Fresh Distributors, Inc. v. New England Apple Products Co., Inc.*, 969 F.2d 552, 556 (7th Cir. 1992), citing *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2d Cir. 1962). The district court, in explaining its decision to allow the anecdotal testimony, acknowledged the limited use of evidence admitted under Rule 803(3): "statements of [a] customer as to his reasons for not dealing with a supplier are admissible for the limited purpose, i.e., the purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motive."[16] App. at 255, citing *Feeser*, 909 F.2d at 1535 n.11; *United Shoe Machinery*, 297 F.2d at 906. Notwithstanding this express acknowledgement, it is clear from the district court's opinion disposing of Tarmac's motion for judgment as a matter of law, that the court considered the customer statements for a purpose beyond which they were originally, and properly, admitted:

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15. Federal Rule of Evidence 803(3) provides in pertinent part:

> *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

16. As we stated in *Feeser*, "the reason why a customer was not doing business with a particular seller is relevant in a lost profits/sales inquiry and its causal connection to the pricing practices of the alleged violator." *Feeser*, 909 F.2d at 1535 n.11. Although the customer statements at issue in this case clearly were admissible as evidence of why the customers were not purchasing Tarmac MAPs from Stelwagon, i.e., because they *thought* they could get a better deal elsewhere, the statements were not admissible as proof that Stelwagon's customers did, in fact, purchase MAPs from one of Stelwagon's competitors.

> Stelwagon [] introduced . . . the anecdotal evidence of its customer statements, admitted under the state of mind exception, *see* Fed. R. Evid. 803(3); *J.F. Feeser*, 909 F.2d at 1535 n.11; *Kraft Foods, Inc. v. BC-USA, Inc.*, 840 F. Supp. 344, 348 (E.D. Pa. 1993), *to establish that it actually lost sales to Celotex and Standard.*

Stelwagon, 862 F. Supp. at 1368 (emphasis added).

Because the statements properly could not have been admitted in the first instance as proof of the fact of the matter asserted, we believe the district court's reliance on them as proof of actual antitrust damages, in the form of lost sales, was in error.[17]

2. Expert Evidence

The only other evidence offered by Stelwagon that possibly could have supported a finding of actual injury was the expert testimony and report of Dr. Perry. In essence, Dr. Perry's testimony with respect to Stelwagon's lost sales and profits mirrored the conclusions published in his report, which summarizes the methodology used to estimate Stelwagon's losses as follows:

> In order to forecast the lost sales of MAPs by Stelwagon as a result of the price advantage of other distributors, we begin with the year 1988 when Stelwagon first successfully introduced Tarmac's products in the Philadelphia metropolitan area. But for the price

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17. We hasten to note that the district court's reliance on *Feeser* in admitting the customer statements was misplaced. Although in *Feeser* we concluded that the district court erred in excluding similar anecdotal evidence, we did so in the context of an appeal from a summary judgment proceeding. Our de novo review of the depositions revealed that Feeser had offered sufficient admissible evidence to meet the burden of the nonmovant at summary judgment. *Feeser*, 909 F.2d at 1535. Presumably, Feeser would have been able to produce the customers themselves at trial. Accordingly, the rule in this circuit is that hearsay statements can be considered on a motion for summary judgment if they are capable of being admissible at trial. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company*, 998 F.2d 1224, 12 34 n.9 (3d Cir. 1993), citing *Feeser*, 909 F.2d at 1542.

> advantage of other distributors, we assume that Stelwagon's sales of MAPs would have followed a pattern similar to Stelwagon's sales of other products (excluding MAPs). . . . For this reason, we use Stelwagon's sales of other products to forecast the sales of MAPs. . . . From this forecast, we then calculate the lost sales of MAPs in the years following 1988. These lost sales can be converted into lost profits by applying Stelwagon's markup on these products.

App. at 96; *see also* App. at 479-481, 491-93.

In other words, based on the assumption that but for Tarmac's price discrimination, Stelwagon's sales of MAPs would have tracked its sales of non-modified products, Dr. Perry concluded that Stelwagon lost $257,000 in profits as a result of Tarmac's illegal pricing policy. App. at 501.

Tarmac's challenge to Dr. Perry's testimony and report is twofold: first, Tarmac argues that the expert evidence should have been excluded because it was "speculative, not based on actual facts and data, and [because] any probative value [was] substantially outweighed by [its] prejudicial effect." Appellant's Br. at 43. Second, Tarmac claims that the expert evidence "did not constitute a 'legally sufficient evidentiary basis' for the judgment rendered below." Appellant's Br. at 33. Although we do not agree with Tarmac's contention that the district court erred in admitting Dr. Perry's testimony, or in failing to strike the testimony in response to a motion by Tarmac at the conclusion of the direct examination, we do agree that, standing alone, the expert's opinions, as reflected in his testimony and report, are insufficient to support the finding of actual damage.

Significantly, Dr. Perry's analysis failed to sufficiently link any decline in Stelwagon's MAPs sales to price discrimination. The sales may have been lost for reasons apart from the price discrimination — reasons that Dr. Perry's analysis apparently did not take into account. For example, the evidence showed that Stelwagon had higher overhead costs than its competitors. In addition, there was undisputed evidence that Stelwagon experienced other business complications during the relevant time period. In

1988, for example, Stelwagon terminated a vice-president, two territorial managers and three key employees for their part in an embezzlement scheme.

We recognize, of course, that "[i]f some of [plaintiff's] injury was attributed to the price discrimination, [the defendant] is responsible to that extent." *Falls City*, 460 U.S. at 437; *Feeser*, 909 F.2d at 1537. In this case, however, the only evidence directly linking the Robinson-Patman violation to any decline in sales and profits Stelwagon may have experienced is the anecdotal testimony of Stelwagon employees that, as discussed above, should not have been admitted as proof of lost sales' profits. Not only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale prices, it also failed to identify a single lost customer.[18] As a result, Stelwagon's claim for damages under section 4 of the Clayton Act must fail. *See Feeser*, 909 F.2d at 1540 (proof requirements of section 4 are satisfied by direct evidence of lost sales, evidence that the substantial price discrimination reflected in the resale prices of Feeser and the favored competitors directly resulted in Feeser losing certain sales and losing profits on others, and expert report outlining the magnitude of the price difference).

Having concluded that Stelwagon failed to present any direct evidence of lost sales or profits caused by the discriminatory pricing, we will reverse the district court's judgment insofar as it concludes that the record contains sufficient evidence to support an award of damages under section 4 of the Clayton Act.[19]

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18. In *Feeser*, upon which the district court relied in admitting and crediting the customer statements, we expressly noted that "[t]he evidence we find most persuasive is that of the customers of Feeser, corroborating the sales personnel's testimony, that the reason Feeser lost sales was because its prices for Serv-A-Portion products were not competitive." *Feeser*, 909 F.2d at 1537.

19. Because of our conclusion on the issue of Stelwagon's entitlement to damages under the Clayton Act, we do not reach Tarmac's argument that the amount of damages is unsupported by the evidence.

III. *BREACH OF CONTRACT CLAIM*

In addition to the Robinson-Patman claim, Stelwagon brought a state action for breach of contract based primarily on Tarmac's MAPs sales to one of Stelwagon's principal competitors, Allied Roofing, in violation of the exclusive, distributorship agreement between the parties. Tarmac argues that enforcement of the contract is barred by the statute of frauds because the agreement was never reduced to writing and because none of the statute's exceptions apply. Specifically, Tarmac argues that the district court erred in concluding (1) that Stelwagon established a waiver of the statute by a showing of custom in the industry, and (2) that the performance exception removed the distributorship contract from the statute's protection.

Although, in general, the statute of frauds acts as a bar to the enforcement of oral agreements, it is well settled that such agreements may be taken out of the statute of frauds if there is evidence to establish that the agreement was made. *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387, 394 (E.D. Pa. 1988). This rule promotes the underlying purposes of the statute of frauds: to prevent perjury and fraud, *Simplex Precast Industries, Inc. v. Biehl*, 149 A.2d 121, 123 (1959), and to prevent parties from escaping their legal obligations. *M. Leff Radio Parts*, 706 F. Supp. at 394.

Stelwagon's contract claim survives Tarmac's statute of frauds challenge based on the established doctrine that part performance of an indivisible contract will take the whole contract out of the statute of frauds. *W.I. Snyder Corp. v. Caracciolo*, 541 A.2d 755, 779 (Pa Super. 1988). "We conclude it is appropriate for Pennsylvania to follow the weight of authority in this area and rule that part payment of an indivisible contract takes the entire contract outside of the requirements of the Statute of Frauds." *Id.*

We agree with the district court's conclusion that Stelwagon's exclusive dealing agreement with Tarmac was indivisible. Any other conclusion renders Stelwagon and Tarmac's agreement meaningless. If the contract was divisible by time or by shipments, Tarmac would only have

obligated itself to deal exclusively with Stelwagon so long as it chose to do so.[20] Nor is there any way to limit the agreement by geographic area without doing violence to the jury's conclusion that the exclusive dealing agreement between Tarmac and Stelwagon covered the whole Philadelphia area. Once Tarmac granted Stelwagon an exclusive distributor contract, albeit orally, and acted on it, that agreement could only be enforced as a whole or not at all.

Moreover, the record reflects more than sufficient evidence of Tarmac's part performance. From 1988 to 1989, Tarmac honored the exclusive distributor contract. Tarmac forbade Sellmore Roofing, one of Stelwagon's competitors, from selling Tarmac MAPs in Philadelphia after Stelwagon alerted Tarmac to Sellmore's sales. Tarmac refused to sell MAPs to Bradco, a Philadelphia roofing supplier, because of its contract with Stelwagon. These performances validate Stelwagon's claim that an exclusive distributor contract existed. Hence, Stelwagon's contract claims should not be barred by the statute of frauds and the jury's award of damages for that claim must be affirmed.[21]

IV. *CONCLUSION*

For the reasons set forth above, the district court's denial of Tarmac's motion for judgment as a matter of law will be affirmed insofar as it pertains to Stelwagon's breach of contract claim. We will also affirm the district court's finding that Stelwagon successfully proved that Tarmac's

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20. The lack of a definite date on which the agreement ends does not determine Stelwagon's claim. 13 Pa. Cons. Stat. Ann. § 2204(c) preserves a contract even if one or more terms are indefinite as long as there is a "reasonably certain basis for giving an appropriate remedy." 13 Pa. Cons. Stat. Ann. § 2309(b) states "Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party." Tarmac has never argued that it terminated the exclusive dealership arrangement nor that the four-year period of exclusivity by Stelwagon was not reasonable.

21. Because of our decision on the issue of part performance, we need not address the parties' arguments with respect to usage of trade.

discriminatory pricing scheme violated the Robinson-Patman Act; however, because we do not believe that Steiwagon offered sufficient proof of actual antitrust damages, we will vacate that portion of the district court's judgment that upholds the jury's award of damages under section 4 of the Clayton Act, and remand the case for entry of judgment consistent with this opinion.

GARTH, *Circuit Judge*, concurring.

I agree that Stelwagon's antitrust verdict cannot stand and that Stelwagon is entitled to breach of contract damages. I write separately because I have some differences with Judge Lewis with respect to his analysis regarding Celotex Corporation. I am also of the opinion that the issue of damages as it arose from Stelwagon's relations with Standard should be explained. Those differences and that explanation do not call for a difference in result.

I.

I agree with the majority that proof of actual competition is critical to proof of a Robinson-Patman second line price discrimination claim. Maj. Op. at 6. As Judge Lewis' opinion states, actual competition requires proof of both functional and geographic competition — proof that "the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market." *Id.* (quoting *Best Brands Beverage, Inc. v. Fallstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987)).

I cannot agree however that Celotex competed with Stelwagon. Celotex sold private label MAPs, which were manufactured by Tarmac, in various parts of the east coast, including Philadelphia. But unlike Stelwagon, Celotex sold to *distributors*, not to *roofing contractors*. Thus, Celotex sold to Stelwagon's competitors, not Stelwagon's customers. That is to say, Celotex operated at a different functional level than Stelwagon, i.e. one functional level above Stelwagon.

Keenan, Stelwagon's President, testified that Celotex sold almost exclusively to other distributors and repeatedly offered to sell to Stelwagon. App. 299-300. Not one of the 163 Celotex customers identified at trial was proven or even alleged to be a roofing contractor. App. 138-46.

Despite this evidence, Stelwagon claims that it competed with Celotex based on Keenan's hearsay testimony that Celotex had once sold directly to Alper Roofing, a contractor. App. 302-03.[1] Keenan had previously testified

1. I understand footnotes 16 and 17 to state that Keenan's hearsay testimony was admissible at trial for the limited purpose of showing

that manufacturers occasionally sold directly to contractors for large jobs. App. 300. I cannot agree that evidence of one sale sufficed to permit the jury to conclude that Celotex competed on a general basis with Stelwagon.

Nor does the record reveal that the price discount received by Celotex violated § 2(b) of the Clayton Act. *See Texaco v. Hasbrouck*, 496 U.S. 543, 571 (1990).[2] The record here is devoid of evidence of Celotex's costs as compared with any price discount received. There is no evidence of the prices Celotex charged its customers, and there is no evidence in the record that Celotex operated both as a distributor as well as a supplier in Philadelphia. This failure of proofs distinguishes Stelwagon's claims from those discussed in *Texaco*. Hence, on this record, I could not hold that Celotex competed with Stelwagon.

Despite this disagreement with the majority, I concur in Judge Lewis' opinion that Stelwagon failed to produce evidence of actual competitive injury — that is, evidence of actual lost sales. I therefore agree that we must reverse Stelwagon's antitrust verdict on that account.

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motive only. If indeed Stelwagon had produced at trial the customer who made the statement to Keenan, that testimony would certainly have been admissible. Short of producing the actual declarant at trial, however, Keenan's testimony was still hearsay and thus had to satisfy a hearsay exception (here Fed. R. Evid. 803(3)). It was accordingly admissible but limited to proof of motive.

Stelwagon introduced evidence that other contractors bought Celotex's product but Stelwagon did not produce evidence that those contractors purchased the MAPs directly from Celotex. The fact that a consumer may buy Dole canned goods from Foodtown does not mean that A & P, Foodtown's competitor, is also Dole's competitor.

2. In *Texaco*, Hasbrouck had purchased gasoline for his retail station at a price which exceeded that which Texaco had sold to two distributors. These distributors had then sold to retail stations which they owned and to independent retail stations. 496 U.S. at 547-51. The Court concluded that the distributors' mixed functions, the evidence of intentional price discrimination by Texaco, and the amount of the discount as compared to the actual costs incurred by the distributors sufficed to prove a price discrimination claim. *Id.* at 572-73.

Even if I had not concluded that Stelwagon had failed to prove actual antitrust injury, I would still vote to reverse Stelwagon's verdict because Stelwagon failed to quantify its damages adequately. While the burden of proving damage in an antitrust case is reduced, *see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981), the damages alleged must arise from whatever injury to competition has been demonstrated.

Stelwagon's proof at trial established that Standard Roofing Supply competed with Stelwagon only for sales out of Stelwagon's Comly (North Philadelphia) and Camden, New Jersey warehouses. Despite this, Stelwagon sought to quantify its damages only with respect to the combined sales of all six of its warehouses. Stelwagon never broke down its sales separately for the Comly and Camden locations. Given that Standard competed only with those two warehouses, however, Stelwagon's combined sales figures could not and did not provide an adequate basis to quantify any damage which resulted from the favorable prices Standard received.

It would be impermissibly speculative to extrapolate from Stelwagon's overall sales figures, which Stelwagon entered into evidence, the particular damage to Stelwagon that may have resulted from price discrimination at Stelwagon's Comly and Camden locations.

II.

Having expressed my reservations about the majority's opinion as to whether Celotex competed with Stelwagon and the quantification of damages, I nonetheless reach the same result as the majority has. Accordingly, I concur in the judgment reversing Stelwagon's verdict on the Robinson-Patman claim and affirming Stelwagon's verdict on the contract claim.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2004

STELWAGON MANUFACTURING COMPANY,

Appellee,

vs.

TARMAC ROOFING SYSTEMS, INC.,

Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 92-cv-01073)

Present: Cowen, Lewis and Garth, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel May 16, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 13, 1994, be, and the same is hereby affirmed insofar as Tarmac's motion for judgment as a matter of law was denied; affirmed insofar as the finding that Stelwagon successfully proved that Tarmac's discriminatory pricing scheme violated the Robinson-Patman Act; and, vacated insofar as the jury's award of treble damages under section 4 of the Clayton Act was affirmed and the cause is remanded to the said District Court with instruction to enter judgment in accordance with the opinion of this Court. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK

Clerk

Dated: August 24, 1995

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STELWAGON MANUFACTURING COMPANY,	:	CIVIL ACTION
	:	NO. 92-1073
Plaintiff,	:	
	:	
v.	:	
	:	
TARMAC ROOFING SYSTEMS, INC.,	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. SEPTEMBER 12, 1994

This antitrust and breach of contract action was tried to a jury, which rendered a verdict in plaintiff's favor. Post-trial motions were subsequently filed, with defendant claiming various points of legal and trial error. For the reasons herein stated, the defendant's motion for judgment as a matter of law and for a new trial will be denied, but its motion for remittitur will be granted.[1]

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[1] Given the remittitur, the Court will continue its consideration of Stelwagon's motion for attorney's fees pending final resolution of this matter.

I. BACKGROUND

Stelwagon Manufacturing Company ("Stelwagon") is a wholesale distributor of roofing and related materials.[2] In early 1988, Stelwagon entered into an oral, semi-exclusive distributorship agreement with Tarmac Roofing Systems, Inc. ("Tarmac"), for the distribution of Tarmac's modified asphalt products ("MAPs") in the Philadelphia area. MAPs are rolled roofing products used to cover flat roofs, and are sold to roofing contractors. See Tr. of 12/14/93, at 56-57 (Keenan). Stelwagon sold Tarmac-brand MAPs in 1988 and 1989 without incident in the relationship and with steadily improving results. In early 1989, Stelwagon became aware of sales made to its competitors in violation of the agreement. Some of these sales were also made at preferential prices. Stelwagon complained to Tarmac, and eventually brought the instant action, alleging breach of contract as well as price discrimination in violation of federal antitrust law. See 15 U.S.C. §§ 13(a), 15.

Defendant moved at the close of plaintiff's case, and again at the close of all the evidence, for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a)(1)[3] on all counts of

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[2]Notwithstanding the company's name, Stelwagon is not a manufacturer. See Tr. of 12/14/93, at 52 (testimony of John R. Keenan).

[3]Federal Rule of Civil Procedure 50(a)(1) provides that:

(continued...)

plaintiff's complaint. Both of these motions were denied and the case was submitted to the jury, which rendered a verdict in plaintiff's favor on the breach of contract and price discrimination claims, awarding plaintiff $1,500,000 and $772,000 respectively. The Court trebled the antitrust damages, see 15 U.S.C. § 15, and entered judgment in plaintiff's favor in the amount of $3,816,000. Defendant now renews its motion, and, in the alternative, request a new trial or remittitur. See Fed. R. Civ. P. 50(b), 59(a).[4]

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[3](...continued)

> If during a trial by a jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

[4]Rule 50(b) reads, in relevant part, as follows:

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to
>
> (continued...)

II. DISCUSSION

A. Legal Standards

The discarding of a jury verdict and entry of judgment as a matter of law in favor of the party who failed to prevail at trial is not lightly done. The evidence in the case must be viewed in the light most favorable to the successful party, and every reasonable inference therefrom must be drawn in that party's favor. See Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 190 (3d Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1285 (1993); Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1178 (3d Cir. 1976) ("The trial judge, in his review of the evidence, . . . must

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[4](...continued)
have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . .

Rule 59(a) reads, in relevant part, as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

expose the evidence to the strongest light favorable to the party against whom the motion is made and give him the advantage of every fair and reasonable inference."), cert. denied, 429 U.S. 1053 (1977). It is impermissible to question the credibility of witnesses, or to weigh conflicting evidence as would a fact-finder. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir. 1993). Applying these precepts, a jury verdict can be displaced by judgment as a matter of law only if "the record is 'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980) (quoting Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969)), cert. denied, 450 U.S. 959 (1981).

Similar concerns restrict the Court's discretion in ordering a new trial pursuant to Federal Rule of Civil Procedure 59. "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts." Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.) (in banc), cert. denied, 364 U.S. 835 (1960). A new trial on the basis that the verdict is against the weight of the evidence can be granted "only where a miscarriage of justice would result if the verdict were to stand." Klein v. Hollings, 992 F.2d 1285, 1290 (3d Cir. 1993). Where the proffered basis is trial error, "[t]he court's inquiry . . . is twofold. It must first determine whether an error was made in the course of the trial, and then must determine whether that error was so prejudicial that refusal to grant a new

trial would be inconsistent with substantial justice." Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021, 1026 (E.D.Pa. 1993) (quotation marks omitted), aff'd without op., ___ F.3d ___ (3d Cir. July 22, 1994); see Fed. R. Civ. P. 61. An error in jury instructions must be so substantial that, viewed in light of the evidence in the case and the charge as a whole, "'the instruction was capable of confusing and thereby misleading the jury.'" Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 922 (3d Cir. 1986) (quoting United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195 (3d Cir. 1984)).

B. Breach of Contract Claim

1. Failure to establish the terms of the contract by clear and precise evidence

The parties agree that, under Pennsylvania law,[5] the terms of an oral contract must be established by clear and precise evidence in order to be enforceable.[6] Richardson v. John F.

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[5]In resolving Stelwagon's breach of contract claim, state law applies. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Neither party contests that Pennsylvania law applies.

[6]Although plaintiff has agreed that this is the evidentiary standard it must meet, the Court's review of the case law does not support this conclusion. Although a number of cases decided by the federal courts sitting in Pennsylvania have adopted (continued...)

[6](...continued)
this characterization of Pennsylvania law, see, e.g., Richardson v. John F. Kennedy Memorial Hosp., 838 F. Supp. 979, 987-88 (E.D.Pa. 1993); Kassab v. Ragnar Benson, Inc., 254 F. Supp. 830, 832 (W.D.Pa. 1966), it appears that the case upon which this line of precedent is based, Miller v. Wise, 33 Pa. Super. 589, 593 (1907), dealt not with a garden-variety oral contract, but with an oral contract that allegedly modified a written agreement. See Pellegrene v. Luther, 169 A.2d 298, 299 (Pa. 1961) ("The law is well settled that a written agreement can be modified by a subsequent oral agreement provided the latter is based upon a valid consideration and is proved by evidence which is clear, precise and convincing.") The clear and precise standard has also been applied when fraud is claimed in the formation of a contract, see Krause v. Great Lakes Holdings, Inc., 563 A.2d 1182, 1187 (Pa. Super. 1989), appeal denied, 574 A.2d 70 (Pa. 1990), or when an oral contract creating or modifying a will is sought to be enforced, see Kelly v. Sheehan, 105 A.2d 706, 707 (Pa. 1954); Hatbob v. Brown, 575 A.2d 607, 612 (Pa. Super. 1990). Also significant is the omission of this standard in the Pennsylvania Suggested Standard Civil Jury Instructions, which highlight that oral contracts are just as enforceable as written ones, see Pa. SSJI (Civil) § 15.01, but fail to mention the clear and precise standard. Thus, the heightened standard of clear and precise evidence would appear to be applicable to situations where a party seeks to modify a written document with a
(continued...)

Kennedy Memorial Hosp., 838 F. Supp. 979, 987-88 (E.D.Pa. 1993), Gorwara v. AEL Indus, Inc., 784 F. Supp. 239, 242 (E.D.Pa. 1992). The clear and precise standard, however, does not require that there be undisputed evidence in the record. Rather, "[o]nce it is determined that the parties intended to form a binding agreement, certainty of terms is important only as a 'basis for determining the existence of a breach and for giving an appropriate remedy.'" Browne v. Maxfield, 663 F. Supp. 1193, 1198 (E.D.Pa. 1987) (quoting Restatement (Second) of Contracts § 33). "Exact precision" is not required. Richardson, 838 F. Supp. at 988. The jury is to determine the terms and the parties' understanding thereof, viewed in light of all the surrounding circumstances. See Lucacher v. Kerson, 48 A.2d 857, 857-58 (Pa. 1946); McCormack v. Jermyn, 40 A.2d 477, 479-80 (Pa. 1945); Kirk v. Brentwood Manor Homes, Inc., 159 A.2d 48, 51 (Pa. Super. 1960). At trial, testimony concerning the distributorship agreement was offered by numerous witnesses, including John Keenan, plaintiff's vice president and general manager, and Gordon Amhaus, former vice president of sales and marketing at

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[6](...continued)
subsequent oral contract, not for generally establishing an oral contract.

Since both parties have argued that the clear and precise standard applies, and since plaintiff's proof was sufficient to go to the jury based on the higher standard, the Court will apply the clear and precise standard in this case.

Tarmac.[7] That there were conflicts or contradictions in the testimony is of no moment, since resolution of such inconsistencies is peculiarly the province of the jury. The testimony offered supports Stelwagon's version of the contract between the parties: an exclusive distributorship within Philadelphia, with the exception of Roofer's Mart, a pre-existing distributor. There is no basis for entry of judgment as a matter of law in favor of defendant.

2. Failure to establish damages

Tarmac argues that Stelwagon also failed to introduce evidence of damages resulting from the breach of contract. Stelwagon argues that it introduced sufficient evidence to allow the jury to calculate its lost profits due to the breach of the distributorship agreement. Stelwagon may recover lost profits "if there is (1) evidence to establish the damages with reasonable certainty; (2) they were the proximate consequence of the wrong; [and] (3) they were reasonably foreseeable." Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 680 (3d Cir. 1991) (citing Delahanty v. First Pennsylvania Bank, N.A., 464 A.2d 1243, 1258 (Pa. Super. 1983)). Stelwagon offered at trial the expert testimony of Dr. Martin Perry, who opined on Tarmac's sales of MAPs to one of Stelwagon's competitors, Allied Roofing, as well as on Stelwagon's

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[7]At the time of the trial, Mr. Amhaus was employed by GS Roofing Products, Inc., a company that had purchased Tarmac's assets while the litigation was pending. See Tr. of 12/15/1993, at 97-98 (testimony of Gordon Amhaus).

average profit margin. See Tr. of 12/16/93, at 77-79 (testimony of Dr. Martin Perry). Sales within Philadelphia in violation of the distributorship agreement represented lost volume to Stelwagon. This was sufficient evidence from which the jury could conclude that, to the extent Allied sold Tarmac-brand MAPs in Philadelphia, Stelwagon suffered a loss of profits.[8]

3. Contract was barred by the Statute of Frauds

Neither party contests the applicability of Article Two of the Uniform Commercial Code, governing the sale of goods, to the distributorship agreement. See 13 Pa. Cons. Stat. Ann. §§ 2101-2725 (1984 & Supp. 1994); Weilersbacher v. Pittsburgh Brewing Co., 218 A.2d 806, 807-08 (Pa. 1966). Tarmac argues that the distributorship agreement alleged by Stelwagon violates the statute of frauds because there is no writing and the contract does not come within any of the statute's exceptions. See 13 Pa. Cons. Stat. Ann. § 2201. Specifically, Tarmac argues that judgment as a matter of law must be entered

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[8]In the alternative, Tarmac requests a new trial because Dr. Perry's opinion was improperly admitted and because the verdict was against the weight of the evidence. The former issue is taken up infra. As to the weight of the evidence argument, the liability verdict in Stelwagon's favor does not constitute "a miscarriage of justice." See Klein, 992 F.2d at 1290. The amount of damages, however, is suspect, and forms the basis for the Court's remittitur, also discussed infra.

because waiver of the statute cannot be established by custom in the industry, there was no evidence of a prior course of dealing between the parties, and there was insufficient evidence of part performance. These contentions are without merit. As the Pennsylvania Superior Court held in H.B. Alexander & Son, Inc. v. Miracle Recreation Equipment Co., 460 A.2d 343 (Pa. Super. 1983), custom and usage of trade can indicate that there has been a waiver of the statute of frauds' protection, see, id. at 345. See also Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038, 1044-45 (E.D.Pa. 1994). That there was no prior course of dealing between Stelwagon and Tarmac is irrelevant, since there was evidence in the record to support a conclusion that Tarmac waived the statute of frauds in line with the established industry course of dealing. See Tr. of 12/14/93, at 77-78 (Keenan); Tr. of 12/15/93, at 116-21 (Amhaus).

Likewise, the jury was correctly instructed on the performance exception to the statute of frauds. See 13 Pa. Cons. Stat. Ann. § 2201(c)(3). Amhaus acknowledged that, as a Tarmac vice president, he enforced the exclusivity provisions of the distributorship agreement. See Tr. of 12/15/93, at 124 (Amhaus); Tr. of 12/14/93, at 84-86 (Keenan). The argument that the performance exception only excepts the contract to the extent of actual performance is not apposite in the context of a distributorship agreement, where the parties are pledging to use their best efforts. Unlike the sale of discrete goods, upon which Article Two is originally grounded, a distributorship agreement cannot be readily segmented. Tarmac's conduct

indicated the existence of an agreement, and it cannot claim inequity in being held to the full terms of the agreement it entered into. As Justice Musmanno penned in describing the role of the statute of frauds:

> The laudable purpose of this guardian of truth is to prevent frauds and perjuries. Occasionally, however, an embattled property owner or prospective purchaser of land, summons the statute to enforce a condition which does not seem to coincide with principles of honesty and fair dealing. In such cases the Courts should study the situation involved to make certain that the statute is not being used to perpetrate fraud and perjuries rather than prevent them.

Simplex Precast Indus., Inc. v. Biehl, 149 A.2d 121, 123 (Pa. 1959). Tarmac's motion for judgment as a matter of law on the statute of frauds issue must be denied.[9]

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[9]Tarmac argues in the alternative that the failure to show a clear and unequivocal waiver and the Court's incorrect instruction on the performance exception demand a new trial. Tarmac also claims that the jury's verdict on the performance issue was against the weight of the evidence. The Court finds these arguments to be without merit.

4. Improper instruction on breach of duty of good faith

Tarmac argues that the jury was incorrectly instructed that it could award Stelwagon damages if it found that Tarmac breached the duties of good faith and fair dealing and Stelwagon suffered damages therefrom, citing to Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 154 (Pa. Super. 1989). Tarmac claims that the court's charge allowed the jury to award damages without finding that an express term of the contract was breached. This argument is unavailing for two reasons. First, given the Court's lowering, via remittitur, of the breach of contract damages to the specific amount of MAPs sold by Allied in violation of the express terms of the distribution agreement, i.e., in Philadelphia, no damages will be awarded for breach of the duties of good faith and fair dealing. Second, while the actual holding of Creeger Brick is that, with a few exceptions, Pennsylvania law does not recognize a duty of good faith in general contract law, see, id., at 153-54, in this case, Article Two of the UCC expressly imposes such a duty on every contract for the sale of goods, see 13 Pa. Cons. Stat. Ann. §§ 1203, 2103, and thus this duty informs the performance of the instant contract's terms. See Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 699 (E.D.Pa. 1993) ("The chief purpose of the good faith obligation is 'to enable enforcement of the contract terms in a manner consistent with the parties' reasonable expectations.'") (quoting Coxfam, Inc. v. AAMCO Transmissions, Civ. A. No. 88-6105, 1990 WL 131064, at *5 (E.D.Pa. Sept. 6, 1990)). In this case, Stelwagon

introduced evidence of Tarmac's skirting the geographic limits of the distributorship agreement by selling to distributors that, while situated just outside of Philadelphia, sold their goods into Philadelphia. See Tr. of 12/14/93, at 113-14 (Keenan). Whether this conduct was consistent with the parties' reasonable expectations of performance was an issue for the jury to decide.[10]

C. Robinson-Patman Act Claim

Stelwagon argued that it suffered a second-line Robinson-Patman Act violation. a second-line injury "is characterized by price discrimination by a seller in sales to competing buyers." J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1526 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991); see FTC v. Fred Meyer, Inc., 390 U.S. 341, 348-49 (1968). Tarmac challenges Stelwagon's verdict on the Robinson-Patman claim, asking for judgment as a matter of law, or, in the alternative, a new trial. Because none of the arguments have merit, the motions will be denied.

1. Failure to show harm to competition

"In order to establish a prima facie violation of section 2(a) of the [Robinson-Patman] Act, a plaintiff must demonstrate a reasonable possibility that a price difference may harm competition."

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[10]Whether there was sufficient evidence to support the damages awarded is a different matter, one taken up below in the discussion of the motion for remittitur.

J.F. Feeser, 909 F.2d at 1531 (citing Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983)). Tarmac argues that Stelwagon failed to present, as a matter of law, any evidence establishing harm to competition, either by showing a substantial price discrimination between competitors over time or by evidence of actual lost sales or profits. See id. at 1535; see also FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948).

The record, however, contains evidence that would support a jury finding of harm to competition under either method. The testimony of Keenan, Amhaus, and two of Stelwagon's territorial managers supported a finding that Stelwagon was competing with Standard Roofing, which was receiving more favorable pricing than Stelwagon. See Tr. of 12/14/93, at 63-65 (Keenan); Tr. of 12/15/93, at 51-52 (Bannon); id. at 79-80 (Quinn); id. at 116-18 (Amhaus). Additionally, there was evidence that Celotex competed with Stelwagon, and that Celotex, which was characterized as a manufacturer, was in economic reality acting on the same distribution level as Stelwagon. See Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 552-55 (1990); Tr. of 12/15/93, at 4-11 (Keenan) (testifying that Celotex had sold MAPs directly to a roofing contractor to which Stelwagon also sells); Tr. of 12/16/93, at 129-32 (testimony of Marlene E. Granitz) (testifying that Tarmac sometimes shipped Celotex-brand MAPs directly to distributors). Stelwagon also introduced the testimony of Dr. Perry and the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, see Fed. R. Evid. 803(3); J.F. Feeser, 909 F.2d at 1535 n.11; Kraft

General Foods, Inc. v. BC-USA, Inc., 840 F. Supp. 344, 348 (E.D.Pa. 1993), to establish that it actually lost sales to Celotex and Standard. On this basis, Tarmac's claim that Stelwagon failed to introduce sufficient competent evidence to support a finding of harm to competition must fail.

2. Failure to show antitrust injury

In addition to establishing a prima facie Robinson-Patman Act violation, a plaintiff must also show actual damages before it can recover treble damages under the Clayton Act. See Texaco, Inc., 110 S. Ct. at 2551 & n.31; J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561-62 (1981). Tarmac argues that Stelwagon has failed to establish this antitrust injury that is essential to the verdict entered by the jury. This argument is without merit. Stelwagon presented testimonial witnesses who established that sales were lost to Standard and Celotex due to the lower prices they were able to offer due to the price discrimination, as well as the actual decline in sales Stelwagon suffered during the relevant time period and the expert testimony of Dr. Perry.[11]

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[11]Tarmac's repeated attempts to exclude the testimony of Dr. Perry rest largely on the basis that Dr. Perry's methodology is flawed. The Court found Dr. Perry to be qualified, without objection, as an expert in economics and price discrimination analysis. See Tr. of 12/16/93, at 51-52. Review of Dr. Perry's methodology indicates application of standard economic principles.

(continued...)

D. Other Trial Errors

1. No missing witness instruction

Tarmac requested at the close of the evidence that the Court give a missing witness instruction, arguing that Stelwagon's witnesses had referred to the

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[11](...continued)
Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, ___, 113 S. Ct. 2786, 2795-97 (1993) (discussing the application of the Rules of Evidence to proffered scientific expert testimony). Tarmac's complaints are essentially disagreements with Dr. Perry's conclusions as well as the thoroughness of his factual basis. The Court finds that there were sufficient facts upon which to base the opinion and that any flaws in the process are not so substantial to deprive Dr. Perry of "'good grounds' for his . . . conclusions." In re Paoli R.R. Yard PCB Litig., No. 92-1995, slip op. at 49 (3d Cir. Aug. 31, 1994). Tarmac's objections are more properly directed at attacking the weight that should be accorded the opinion, not the opinion's admissibility. See Breidor v. Sears, Roebuck & Co., 722 F.2d 1134, 1139-41 (3d Cir. 1983); see also United States v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993); Singer Co. v. E.I. du Pont de Nemours & Co., 579 F.2d 433, 443 (8th Cir. 1978) (holding that "it is . . . for the jury, with the assistance of vigorous cross-examination, to measure the worth of the opinion"). The objections based on the improper admission of Dr. Perry's report are therefore without merit.

statements of customers who were not previously identified. Such an instruction is proper where a witness is peculiarly within the power of one party and would presumably testify in that party's favor, but is not called to testify. See Graves v. United States, 150 U.S. 118, 121 (1893); United States v. Nahoom, 791 F.2d 841, 846 (11th Cir. 1986); Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1353 (7th Cir. 1983). Where witnesses are equally available to both sides, the instruction is not appropriate. See United States v. Vastola, 899 F.2d 211, 235 (3d Cir.), vacated on other grounds, 497 U.S. 1001 (1990). Tarmac's request was denied, as will be its post-trial motion, because it failed to show that the alleged missing witnesses were in the peculiar control of Stelwagon. Indeed, Tarmac did not call any of the customers that it admits Stelwagon's witnesses previously identified, witnesses that presumably could have been called by either side. Tarmac's motion for a new trial on this basis is denied.

2. Exclusion of Dr. Kursh's report and testimony

Tarmac also alleges that the expert report prepared by Dr. Samuel J. Kursh on behalf of Stelwagon for use in a separate, unrelated state court action should have been admitted for purposes of impeaching the testimony of Stelwagon's witnesses concerning the reason for the drop in Stelwagon's MAP sales, or that Dr. Kursh should have been allowed to testify to the same. The Court denied the request on the grounds that the probative value of the material offered was substantially

outweighed by the prejudicial nature of the report and the eleventh-hour manner by which it was introduced by Tarmac. See Fed. R. Evid. 403. The Court declines the invitation to revisit this determination, and the motion for a new trial is therefore denied.

E. Remittitur

Tarmac argues in the alternative that the Court should grant a remittitur in this case due to the excessiveness of the damages awarded. Remittitur is appropriate if the Court "finds that a decision of the jury is clearly unsupported and/or excessive." Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198, 1201 (3d Cir. 1986); see 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2815 (1973). If remittitur is granted, the party against whom it is entered can accept it or can proceed to a new trial on the issue of damages.

In the instant case, the Court is left with the inescapable impression that the damages awarded by the jury in this case are unsupported by the evidence and are grossly excessive. The jury awarded Stelwagon $1,500,00 in damages for the breach of the distributorship agreement. See Tr. of 12/21/93, at 62. Yet, plaintiff's expert was only able to testify as to the damages occasioned by Tarmac's sales to Allied, an amount that he estimated was $42,424. See Pl.'s Ex. 27. Additional damages testimony was offered by Keenan, who testified that the cost of the MAPs was only 40% of the sale in a "new roof" job, with the other 60% composed of the sale of related products with similar profit margins. See Tr. of

12/14/93, at 59-61. In sales for "re-roof" jobs, the MAPs made up two-thirds of the sale, with the related products making up one-third. Keenan also testified that new roofs were about 25% of sales, and re-roofs 75%. Applying these percentages, as well as Dr. Perry's calculation of lost MAP sales and Stelwagon's profit margin, arrives at a figure of $72,242:

	MAP Sales	Ratio Between Related Product Sales and MAP Sales	Total Related Product Sales
New Roof	$10,606 (42,424 x .25)	1.5 (.60/.40)	$15,909
Re-roof	$31,818 (42,424 x. .75)	.5 (.33/.66)	$15,909
			$31,818
		MAP Sales	$42,424
		TOTAL SALES	$72,242

Though damages do not have to be calculated or estimated with mathematical certainty, there must be some basis in the record for a jury's award. See Advent Sys., 925 F.2d at 681. There was no evidence presented in this case supporting a figure on the breach of contract claim in excess of $72,242.

Likewise, the figure calculated by Dr. Perry in support of the Robinson-Patman claim is only $257,362. See Pl.'s Ex. 23. Even using the percentages attested to by Keenan, as described supra, the amount of damages increases only to $450,383.50, a good deal removed from the $772,000 verdict entered by the jury and subsequently trebled by the Court:

	MAP Sales	Ratio Between Related Product Sales and MAP Sales	Total Related Product Sales
New Roof	$ 64,340.5 (257,362 x .25)	1.5 (.60/.40)	$ 96,510.75
Re-roof	$193,021.50 (257,362 x .75)	.5 (.33/.66)	$ 96,510.75
			$193,021.50
		MAP Sales	$257,362
		TOTAL SALES	$450,383.50

Based on the figures just calculated, the Court determines that Stelwagon's total damages in this case, after trebling of the Robinson-Patman damages, should be in the amount of $1,423,392.50.[12] The Court having previously entered judgment in the amount of $3,816,000, Stelwagon will be ordered to remit $2,392,607.50 within twenty days, or, if remittitur is refused, to submit to a new trial on damages.[13]

An appropriate order shall be entered.

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[12]$74,242 + ($450,383.50 x 3) = $1,423,392.50.

[13]Given the disposition of defendant's post-trial motion, plaintiff's petition for attorney's fees will be denied without prejudice, pending the final resolution of this litigation.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STELWAGON MANUFACTURING COMPANY,	:	CIVIL ACTION
	:	NO. 92-1073
Plaintiff,	:	
	:	
v.	:	
	:	
TARMAC ROOFING SYSTEMS, INC.,	:	
	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 12th day of September, 1994, upon consideration of defendant's motion for judgment as a matter of law, new trial, and/or remittitur (Doc. No. 63), and plaintiff's motion for attorney's fees (Doc. No. 64), for the reasons stated in the Memorandum accompanying this Order, it is hereby **ORDERED** as follows:

1. Defendant's motion for judgment as a matter of law is **DENIED**;

2. Defendant's motion for a new trial is **DENIED**;

3. Defendant's motion for remittitur is **GRANTED**.

Plaintiff shall remit $2,392,607.50 within twenty (20) days of this Order, or, if remittitur is refused, shall submit to a new trial on damages; and

4. Plaintiff's motion for attorney's fees is **DENIED WITHOUT PREJUDICE**.

AND IT IS SO ORDERED.

/s/ EDUARDO C. ROBRENO
EDUARDO C. ROBRENO, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2004

STELWAGON MANUFACTURING COMPANY

vs.

TARMAC ROOFING SYSTEMS, INC.

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN and GARTH,* Circuit Judges.

The petition for rehearing filed by appellee, Stelwagon Manufacturing Company, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having

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* Judge Garth's vote is limited to panel rehearing only.

voted for rehearing by the court en banc, the petition for rehearing is denied. Judges Becker, Stapleton and Mansmann would have granted rehearing.

BY THE COURT,

/s/ TIMOTHY K. LEWIS
Circuit Judge

Date: September 27, 1995

Supreme Court, U.S.
FILED
FEB - 8 1996
CLERK

No. 95-1113

In The

Supreme Court of the United States

October Term, 1995

STELWAGON MANUFACTURING COMPANY,

Petitioner,

v.

TARMAC ROOFING SYSTEMS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENT TARMAC ROOFING SYSTEMS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

In a private antitrust action under the Robinson-Patman Act, "the only evidence directly linking the Robinson-Patman violation to any decline in [petitioner's] sales and profits" was "anecdotal evidence of its customer's [out-of-court] statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales." App. 15a, 38a-39a. The Court of Appeals held that this was improper under settled principles of evidence law. The questions presented for review, none of which are significant antitrust issues, and none of which warrant a grant of *certiorari*, are:

1. Whether the Court of Appeals acted properly in vacating the award of damages because of the District Court's erroneous reliance on hearsay.

2. Whether the Court of Appeals decision is also proper because petitioner failed to offer any evidence of even one lost sale, any witnesses or documents from the favored purchasers, any witnesses or documents from its own alleged lost customers, or evidence showing the prices charged by the favored purchasers.

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STATUTES

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15 U.S.C. § 15 2

Respondent Tarmac Roofing Systems, Inc. ("Tarmac") respectfully requests that this Court deny the petition of Stelwagon Manufacturing Company ("Stelwagon") for a writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Third Circuit ("Third Circuit") in *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267 (3d Cir. 1995), *rev'g*, 862 F. Supp. 1361 (E.D. Pa. 1994).[1]

COUNTERSTATEMENT OF THE CASE

From 1987 until 1992, Tarmac manufactured modified asphalt products ("MAPs" or "modifieds") at its facility in Chester, Pennsylvania. Tarmac sold MAPs to distributors, like Stelwagon, who in turn sold the MAPs to roofing contractors. Complaint at ¶ 11. Tarmac also sold MAPs to other manufacturers who resold the MAPs to distributors under their own label.

The undisputed evidence at trial showed that Tarmac sold MAPs to at least fourteen other distributors in Philadelphia, the four surrounding Pennsylvania counties of Delaware, Bucks, Chester and Montgomery, and the adjacent New Jersey counties of Camden, Gloucester and Burlington. Each of these distributors paid the same prices as Stelwagon.

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[1] Pursuant to Supreme Court Rule 29.6, Tarmac represents that it has no subsidiaries and is a wholly owned subsidiary of Permanite, Inc., a Delaware corporation, which is wholly owned by Tarmac PLC, a publicly owned corporation existing under the laws of the United Kingdom.

Throughout the relevant time period, various problems plagued Stelwagon. Unlike its competitors, it had a unionized workforce and multiple locations, which, according to its vice president and general manager, resulted in higher overhead costs than its competition. Moreover, in 1988, three key, high-ranking employees were terminated in an embezzlement scandal and around that time, Stelwagon abandoned plans to open additional warehouses.

Stelwagon contended that Tarmac violated section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and that it was entitled to treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, because Tarmac sold private label MAPs to Celotex Corporation ("Celotex"), one of the largest building materials manufacturers in the United States, and Standard Roofing Company ("Standard"), another distributor, at prices which were lower than those Tarmac charged Stelwagon for MAPs. Stelwagon also contended that it competed with both Celotex and Standard, which had a warehouse in Trenton, New Jersey.

At trial, Stelwagon failed to offer any evidence of a single lost sale or customer. Stelwagon failed to offer any witnesses, documents or invoices from Standard or Celotex, evidence from even one customer who supposedly purchased Tarmac MAPs from Standard or Celotex instead of Stelwagon or even evidence showing the prices charged by Standard and Celotex for Tarmac MAPs.

Instead, in an attempt to prove actual antitrust injury, Stelwagon introduced, as the District Court itself acknowledged, only "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, *to establish that it actually lost sales to*

Celotex and Standard." Stelwagon, 862 F. Supp. at 1368, App. at 38a-39a (emphasis added and citations omitted).

A unanimous panel of the Third Circuit reversed.[2] The Court stated the self-evident proposition that "[s]tatements that are considered under the exception to the hearsay rule found at Fed.R.Evid. 803(3), commonly referred to as the 'state of mind' exception, cannot be offered to prove the truth of the underlying facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (footnote and citations omitted).

The Third Circuit further concluded that the District Court did not limit the use of the hearsay testimony as the rule required, but rather used it improperly as proof of antitrust injury:

> it is clear from the district court's opinion disposing of Tarmac's motion for judgment as a matter of law, that the court considered the customer statements for a purpose beyond which they were originally, and properly, admitted:
>
> > "Stelwagon[ ] introduced . . . the anecdotal evidence of its customer statements, admitted under the state of mind exception, *to establish that it actually lost sales to Celotex and Standard.*"

Stelwagon, 63 F.3d at 1274, App. at 12a-13a (quoting *Stelwagon*, 862 F. Supp. at 1368; brackets, ellipses and emphasis in original; citations omitted). Accordingly, the

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[2] The Third Circuit subsequently denied rehearing. Judges Becker, Stapleton and Mansmann dissented without explanation from the denial of rehearing. *Stelwagon*, 63 F.3d at 1279, App. 47a-48a.

Third Circuit held that "[b]ecause the statements properly could not have been admitted in the first instance as proof of the fact of the matter asserted, we believe the district court's reliance on them as proof of actual antitrust damages, in the form of lost sales, was in error." *Stelwagon*, 63 F.3d at 1274-75, App. at 13a (footnote omitted).

Stelwagon also tried to fill the evidentiary void at trial through its expert witness. However, nothing in the expert's testimony demonstrated any connection between Stelwagon's "decline in sales and profits" and the Robinson-Patman violation. The only evidence of such a link was "the anecdotal testimony of Stelwagon employees that, as discussed above, should not have been admitted as proof of lost sales [and] profits." *Stelwagon*, 63 F.3d at 1275, App. 15a. As the Third Circuit further observed, "[n]ot only did Stelwagon fail to offer any documentary evidence as to the effect of the discrimination on resale prices, it also failed to identify a single lost customer." *Stelwagon*, 63 F.3d at 1275-76, App. at 15a (footnote omitted).

For his part, and without any evidentiary foundation in the record, Stelwagon's expert assumed that Stelwagon's sales of MAPs "should have" grown at the same rate as sales of other products, and that, if the sales of MAPs did not grow at that rate, then the cause must have been price discrimination:

> "But for the price advantage of other distributors, we assume that Stelwagon's sales of MAPs would have followed a pattern similar to Stelwagon's sales of other products (excluding MAPs). For this reason, we use Stelwagon's

> sales of other products to forecast the sales of MAPs. From this forecast, we then calculate the lost sales of MAPs in the years following 1988."

Stelwagon, 63 F.3d at 1275, App. at 13a-14a (quoting report of Stelwagon's expert; ellipses omitted).

Stelwagon's expert offered no support for his assumptions. He failed to identify the "other products" to which he compared Stelwagon's MAPs sales and could not explain why the sales of these products could be used to forecast Stelwagon's MAPs sales. He also did not consider whether Stelwagon's sales of Tarmac MAPs declined because of competition from fourteen distributors with which Stelwagon admitted it competed and which did not receive favorable prices from Tarmac. He completely disregarded whether an embezzlement scheme and termination of several key Stelwagon employees in late 1988 subsequently affected Stelwagon's sales. He also did not consider whether Stelwagon's higher overhead could have affected its sales. Moreover, even though Stelwagon contended that only two of its warehouses competed with Standard, it only offered evidence of an alleged drop in its company-wide sales.

Significantly, in conducting his analysis, Stelwagon's expert reviewed only Tarmac's invoices and failed to review any invoices or documents from Celotex or Standard. Consequently, although he considered the prices charged by Tarmac *to* Celotex and Standard, he had no idea of the prices charged *by* Celotex and Standard. Finally, as noted above and perhaps most significantly, Stelwagon's expert failed to determine whether even a

single Stelwagon customer actually transferred its business to Standard or Celotex. He reviewed nothing from any of Stelwagon's customers.

Accordingly, the Third Circuit concluded that the analysis of Stelwagon's expert was fatally flawed:

> Significantly, Dr. Perry's analysis failed to sufficiently link any decline in Stelwagon's MAPs sales to price discrimination. The sales may have been lost for reasons apart from the price discrimination – reasons that Dr. Perry's analysis apparently did not take into account. For example, the evidence showed that Stelwagon had higher overhead costs than its competitors. In addition, there was undisputed evidence that Stelwagon experienced other business complications during the relevant time period. In 1988, for example, Stelwagon terminated a vice-president, two territorial managers and three key employees for their part in an embezzlement scheme.

Stelwagon, 63 F.3d at 1275, App. at 14a-15a.

Although the Third Circuit recognized that "[i]f some of [plaintiff's] injury was attributed to the price discrimination, [the defendant] is responsible to that extent," *Stelwagon*, 63 F.3d at 1275, App. at 15a (citation omitted and brackets in original), it held that Stelwagon never proved that it was injured by price discrimination. As discussed above, the Third Circuit concluded that Stelwagon failed to prove antitrust injury because "the only evidence directly linking the Robinson-Patman violation to any decline in sales and profits Stelwagon may have experienced is the anecdotal testimony of Stelwagon

employees that, as discussed above, should not have been admitted as proof of lost sales profits." *Stelwagon*, 63 F.3d at 1275, App. at 15a.

Circuit Judge Garth filed a concurring opinion agreeing that Stelwagon failed to prove actual antitrust injury and that "Stelwagon's antitrust verdict cannot stand." *Stelwagon*, 63 F.3d at 1277, App. at 19a (Garth, J. concurring). However, Judge Garth wrote separately to express his conclusion that Stelwagon also failed to prove that it was in competition with Celotex and that even if it had proved actual antitrust injury it "failed to quantify its damages adequately." *Id.* at 1277-78, App. at 20a-21a.

SUMMARY OF ARGUMENT

This Court has repeatedly stressed that even where a plaintiff proves its *prima facie* case under section 2(a) of the Robinson-Patman Act, it must demonstrate that it suffered *actual* damages *caused by* the defendant's price discrimination in order to be entitled to treble damages under section 4 of the Clayton Act. Stelwagon utterly failed to satisfy this requirement.

In an attempt to prove actual antitrust injury, Stelwagon only offered "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations omitted). However, as a unanimous panel of the Third Circuit properly concluded, statements admitted under the state of mind exception "cannot be offered to prove the truth of the underlying

facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (citations omitted).

Moreover, Stelwagon offered no testimony or other evidence from any alleged lost customer. Stelwagon offered no testimony or other evidence from either of the two favored purchasers. Stelwagon also failed to offer any evidence showing the prices charged by the favored purchasers or to whom they sold. Accordingly, the Third Circuit properly held that Stelwagon failed to prove actual antitrust injury and could not recover treble damages under section 4 of the Clayton Act.

REASONS FOR DENYING THE WRIT

I. THE OUT-OF-COURT CUSTOMER STATEMENTS OFFERED BY PETITIONER AT TRIAL COULD NOT BE USED TO PROVE ACTUAL ANTITRUST INJURY

Both the Third Circuit and the District Court recognized that Stelwagon only offered "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, *to establish that it actually lost sales to Celotex and Standard.*" *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (emphasis added and citations omitted); *see Stelwagon*, 63 F.3d at 1274, 1275, App. at 12a, 15a. Accordingly, the Third Circuit properly reversed because statements admitted under the state of mind exception "cannot be offered to prove the truth of the underlying facts asserted." *Stelwagon*, 63 F.3d at 1274, App. at 12a (citations omitted).

The Third Circuit's holding is supported by the decisions of every other court which has ruled on this issue. *See TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 729 (10th Cir. 1993) (affirming directed verdict in defendants' favor: "the document contains hearsay and cannot serve as evidence that the plaintiff lost profits. . . . Accordingly, any suggestion that the [document] demonstrates lost profit damages with any reasonable certainty is untenable"); *Grove Fresh Distributors, Inc. v. New England Apple Products Co.*, 969 F.2d 552, 556 (7th Cir. 1992) (testimony, admitted under the state of mind exception, from plaintiff's employees as to customers' statements "cannot be offered to prove [defendant] in fact underpriced [plaintiff]. The statements are admissible only for showing a customer's motives for no longer dealing with a supplier.").[3] The Second Circuit, in an opinion authored by Judge Friendly, specifically held that a plaintiff could not establish actual antitrust injury through testimony admitted under the state of mind exception: "Statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose [state of mind], although not as evidence of the facts recited as furnishing the motives." *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2d Cir.) (citations omitted), *cert. denied*, 369 U.S. 865 (1962).

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[3] *See also Hunters Internat'l Mfg. Corp. v. Christiana Metals Corp.*, 561 F. Supp. 614, 617 (E.D. Mich. 1982) (granting defendant's JNOV motion, court held that hearsay could not be used to prove lost profits), *aff'd*, 725 F.2d 683 (6th Cir. 1983); *Certified Laboratories v. Rubinson*, 303 F. Supp. 1014, 1025-26 (E.D. Pa. 1969) (lost profits could not be proven through hearsay testimony).

Stelwagon has failed to cite a single case in which a court concluded that a plaintiff proved actual antitrust injury through hearsay like that offered by Stelwagon. The single case relied upon by Stelwagon, *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), Petition at 25-28, actually contradicts its argument.

In *Feeser*, the district court had entered summary judgment in favor of defendant. The Third Circuit reversed concluding that the plaintiff had offered sufficient evidence of actual antitrust injury to avoid summary judgment because of "(a) the *direct evidence* of lost sales . . . [and] (b) the evidence that the substantial price discrimination reflected in the resale prices of [plaintiff] and the favored competitors directly resulted in [plaintiff] losing certain sales and losing profits on other sales because it had to cut its margins." 909 F.2d at 1540. The "direct evidence" offered by the plaintiff consisted of testimony from several of its customers that they purchased from the favored competitors whose prices were lower. *Feeser*, 909 F.2d at 1537. This was in stark contrast to Stelwagon, which did not present the testimony of even a single customer.

For example, the plaintiff in *Feeser*, unlike Stelwagon, presented the testimony of an employee of one of its largest customers that for a five month period plaintiff's prices were consistently higher than those of the favored purchaser and that if plaintiff had not subsequently lowered its prices it would have lost his employer's business. 909 F.2d at 1537. Plaintiff presented the testimony of another customer that "when he wished to purchase portion-controlled products, [the relevant product,] he

would place his order with [the favored purchaser] because [plaintiff's] prices . . . were much higher." *Id.* Stelwagon presented no such testimony.

Moreover, contrary to Stelwagon's representation, *Feeser* does *not* stand for the general proposition that hearsay evidence can be used to prove actual antitrust injury at trial. In *Feeser*, the Third Circuit held that such testimony could only be used as evidence of the state of mind of the disfavored purchaser's customers and *not* as evidence of the underlying facts: " 'statements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose' . . . *but not as evidence of the facts recited as furnishing the motives.*" 909 F.2d at 1535 n.11 (emphasis added and quoting *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 914 (2d Cir. 1962)). In fact, the Third Circuit stressed that out of court statements could only be used to prove the truth of the matter on summary judgment "if the out-of-court declarant could later present the evidence through direct testimony." *Feeser*, 909 F.2d at 1542.

The Third Circuit's ruling that Stelwagon could not prove actual antitrust injury through "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard" is consistent with the decisions of every court which has ruled on the issue. Accordingly, Stelwagon's Petition should not be granted.

II. THE THIRD CIRCUIT PROPERLY CONCLUDED THAT PETITIONER FAILED TO PROVE ACTUAL ANTITRUST INJURY BECAUSE IT FAILED TO OFFER ANY EVIDENCE OF EVEN ONE LOST SALE, ANY WITNESSES OR DOCUMENTS FROM THE FAVORED PURCHASERS OR ANY EVIDENCE SHOWING THE PRICES CHARGED BY THE FAVORED PURCHASERS

At trial, Stelwagon only offered the "anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations omitted). Stelwagon offered no testimony or other evidence from any alleged lost customer or from Celotex or Standard. Stelwagon also failed to offer any testimony or other evidence showing the prices charged by Celotex or Standard. In the absence of such evidence, Stelwagon's expert testimony was fatally flawed and the Third Circuit properly concluded that Stelwagon failed to prove actual antitrust injury because "the only evidence directly linking the Robinson-Patman violation to any decline in sales and profits Stelwagon may have experienced is the anecdotal testimony of Stelwagon employees that, as discussed above, should not have been admitted as proof of lost sales' profits." *Stelwagon*, 63 F.3d at 1275, App. at 15a.

In an attempt to manufacture an issue worthy of this Court's attention, Stelwagon contends that the Third Circuit ignored this Court's precedent when it held that Stelwagon, which did not offer any evidence of even one lost sale, failed to prove actual antitrust injury. Petition at 8-23. However, Stelwagon ignores this Court's holding

that a plaintiff is *not* entitled to "automatic damages" upon proving its case under section 2(a):

> To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. It must prove more than a violation of § 2(a), since such proof establishes only that injury *may* result.

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (emphasis in original and citation omitted). Moreover, this Court specifically held that in order to obtain treble damages a plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969).

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990), on which Stelwagon relies, Petition at 16-17, also supports the Third Circuit's decision. In *Texaco*, plaintiffs, who were retailers of gasoline in Spokane, Washington, complained that Texaco had granted two distributors, Dompier and Gull, both of which also operated as retailers in that city, substantial discounts which enabled the distributors and their customers to undercut the plaintiffs' prices in the citywide competitive market for gasoline. 496 U.S. at 549-50. Significantly, the plaintiffs in *Texaco* offered the type of evidence that Stelwagon utterly failed to offer, namely evidence of the prices charged by the favored purchasers. There was evidence that the first favored distributor, Gull, priced the gasoline at its stations a penny less than the prevailing price for major brands, *id.* at 549, and that the second favored distributor, Dompier, and its customers priced their gasoline at a price "barely

above" that charged by Texaco to plaintiffs, *id.* at 550-51. Moreover, to the extent the distributors sold to independent retailers which competed with plaintiffs, the evidence showed that the two distributors passed their favorable prices along to those retailers. *Id.* at 553 n.10. Stelwagon offered no such evidence.

In *Texaco*, the Court held that proof of the specific *amount* of damages could be less precise than proof of the fact of actual antitrust injury and that plaintiffs' expert testimony adequately estimated the *amount* of damages. 496 U.S. at 572.[4] The Court never held that plaintiffs' expert testimony adequately established the *fact* of actual antitrust injury. To the contrary, the Court explained that plaintiffs "introduced evidence describing the diversion of their customers to specific stations supplied by Dompier" to support a finding of actual antitrust injury. 496 U.S. at 571. Specifically, unlike Stelwagon, plaintiffs offered substantial direct evidence of actual antitrust injury:

> Here, the plaintiffs presented substantial evidence to show that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they

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[4] In the portion of the Court's opinion relied upon by Stelwagon, the Court dealt with Texaco's contention that the damages award with respect to Gull was excessive and improperly based on an extrapolation from data applicable only to Dompier because plaintiffs "offered no direct testimony of any diversion to Gull." *Texaco*, 496 U.S. at 572. The Court rejected this argument because "Texaco's theory improperly blurs the distinction between the liability and damages issues" and proof of the specific amount of damages need be less precise. *Id.*

> flowed from the anti-competitive conduct. Several of them testified as to diverted sales and lost profits; *there was documentary evidence of increases in Dompier's sales volume over the same time period.* Plaintiffs also testified that they would have recouped the lost revenues had they received a price break on their purchases of gasoline from Texaco. *In addition, former customers testified that they had switched service stations because of the lower prices charged by stations supplied by Dompier or Gull.*

Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042-43 (9th Cir. 1987) (emphasis added and footnote omitted), *aff'd*, 496 U.S. 569 (1990).

Perkins v. Standard Oil Co., 395 U.S. 642 (1969), also relied upon by Stelwagon, Petition at 18, likewise supports the Third Circuit's decision. In *Perkins*, the issue was whether the Robinson-Patman Act covered injuries to competition between plaintiff and the customer of the customer of the favored purchaser, *i.e.*, "fourth level" competition. 395 U.S. at 646-47. The Court found that plaintiff established actual antitrust injury with respect to this fourth level competition because there was evidence that the price advantage was passed down to plaintiff's ultimate competitor who in turn undercut plaintiff's prices. *Id.* at 649. However, Stelwagon offered no evidence of the prices charged by Standard or Celotex or whether they undercut Stelwagon's prices.

Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), also cited by Stelwagon, Petition at 22-23, further supports the decision of the Third Circuit. In *Falls City Indus.*, the plaintiff established competitive injury

through *"direct evidence of diverted sales,"* including witnesses' testimony of sales to purchasers, testimony of actual purchasers who had bought from the favored purchasers and evidence of advertising by the favored purchasers in plaintiff's market area. 460 U.S. at 437-38 & n.8 (emphasis added).[5]

Unlike the plaintiffs in *Texaco, Perkins* and *Falls City Indus.*, Stelwagon utterly failed to present any evidence of actual antitrust injury. Stelwagon only introduced "the anecdotal evidence of its customer's statements, admitted under the state of mind hearsay exception, to establish that it actually lost sales to Celotex and Standard." *Stelwagon*, 862 F. Supp. at 1368, App. at 38a-39a (citations

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[5] In the present case, if it had been injured, Stelwagon could have easily proved actual antitrust injury through testimony or other evidence from either Celotex or Standard, or any one of its allegedly lost customers. This it utterly failed to do and, accordingly, could not recover treble damages. By contrast, the other cases on which Stelwagon relies, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), Petition at 18-21, did not involve price discrimination claims. In those cases, which involved conspiracies to monopolize, the plaintiff proved actual antitrust injury by comparing its sales before and after the conspiracy to its sales during the conspiracy or by comparing its sales in the market affected by the conspiracy to its sales in other markets. *Bigelow*, 327 U.S. at 264-65; *Zenith*, 395 U.S. at 123-25; *Continental Ore*, 370 U.S. at 697 & n.7. Such evidence was found sufficient because of "the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." *Zenith*, 395 U.S. at 123.

omitted). The Third Circuit's decision that Stelwagon failed to prove actual antitrust injury is fully consistent with the decisions of this Court. This Court has never held that a plaintiff which fails to offer any evidence of a single lost customer and fails to offer any evidence from the favored purchasers is entitled to treble damages. Accordingly, Stelwagon's Petition should not be granted.

CONCLUSION

For the foregoing reasons, Respondent Tarmac Roofing Systems, Inc. respectfully requests that the Court deny Stelwagon's petition for writ of certiorari.

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